Supreme Court, U.S.
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No. _____

In The Supreme Court Of The United States

OCTOBER TERM 1996

ROBERT F. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Petitioners,

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HERN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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On the Petition
October 17, 1996

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128 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioners establish a violation of First Amendment associational and free speech rights?

LIST OF PARTIES

Parties to this petition are the petitioners Robert A. Kirchgessner, Jr., Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool, Bill Sheeran, Probation Officers/Fraternal Order of Police ("FOP") members on behalf of themselves and all others similarly situated, and the Probation Association of New Jersey. The respondents are Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hearn, Marie L. Garibaldi, Gary S. Stein, in their official capacities as justices of the Supreme Court of New Jersey.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that:

> Congress shall make no law ... abridging the freedom of speech ...

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

ROBERT A. KIRCHGESSER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Petitioners,

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK, DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN; IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Robert A. Kirchgessner, Jr., et al., respectfully pray that a writ of certiorari issue to review the

Orders of the United States Court of Appeals for the Third Circuit dated July 19, 1996 and August 21, 1996 (and the Order of the District Court dated April 28, 1995).

OPINIONS AND ORDERS BELOW

The opinion of the New Jersey Supreme Court dated July 8, 1994, is annexed to the appendix as 44A.

The opinion of the District Court of New Jersey dated April 28, 1995, is annexed as 3A.

The order of the District Court of New Jersey dated April 28, 1995, is annexed as 41A.

The judgment order of the United States Court of Appeals for the Third Circuit dated July 19, 1996 is annexed as 1A.

The order of the United States Court of Appeals for the Third Circuit denying rehearing and rehearing in banc dated August 21, 1996, is annexed as 42A.

JURISDICTION

On July 19, 1996, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court of New Jersey. On August 21, 1996, the Court of Appeals denied the petition for rehearing and rehearing in banc. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

In October and November of 1993, the Probation Association of New Jersey ("PANJ"), passed a referendum to affiliate itself with the Policeman Benevolent Association of New Jersey (the "State PBA"). In September of 1994, the States PBA agreed to become affiliated with the PANJ, if such affiliation was not prohibited by law. Additionally, many of the petitioners were, at that time, members of the Fraternal Order of Police (the "FOP"), including Kirchgessner.

On March 3, 1994, in response to a request by the Chief Probation Officers' Association, the New Jersey Supreme Court announced that it would review its longstanding policy prohibiting probation officer membership in law enforcement organizations, namely the State PBA and the FOP. The New Jersey Supreme Court appointed retired Superior Court Judge Paul R. Huot, as a special master (the "Special Master"), to develop a factual record to aid in its review of the matter. Judge Huot was designated to create a factual record and recommend findings concerning the issue of whether probation officers could continue as members, or otherwise join, associate and affiliate, with the FOP. The questions framed by the Supreme Court for which it desired a factual record and recommended findings of fact are:

> 1) What impact, if any, will membership of probation officers in the FOP or the State PBA have on the probation function?
>
> 2) Will the affiliation of PANJ with the State PBA result in membership in the PBA of probation officers who are members of PANJ?

3) What is the present number of probation officers who are members of the FOP and what have their activities been in connection with that organization?

4) To what extent, if any, may probation officers become involved in or be seen as supporting political activity as a result of membership in either FOP or State PBA?

5) Does the Legislation (N.J.S.A. 34:13A-5.5) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non police to membership imply any legislative policy related to the potential impact on non-police members of such an organization? (74A-75A*).

Preliminarily, Special Master Huot found that there are between 700 and 800 New Jersey Probation Officers who are presently members of the FOP and have been for twenty years. (91A). As to Question Number 1, Special Master Huot found that:

> The testimony and evidence submitted with respect to the impact of membership in a police organization upon the probation function was not such that a true factual determination can be made. The testimony was opinion and speculation. (76A).

As to Question Number 2, Special Master Huot concluded:

> This Special Master does not see any consequences, for good or ill, upon the current PBA members. Since public employees are not permitted to strike, there is no benefit to either group in its collective bargaining.
>
> The consequences of affiliation to the organization of the probation officers association is similar to the consequences to each individual member as set forth in the discussion of the Constitution and By-Laws of the State PBA. It will lose its present autonomy as an organization. (86A).

As to Question Number 3, Special Master Huot concluded:

> ... The recommended finding of fact, therefore, is that the Fraternal Order of Police in New Jersey is a social and fraternal association and that the activities of its members are social, non political and nonlabor oriented. However, lodges in other states have represented probation officers in collective bargaining. (88A).

As to Question Number 4, Special Master Huot concluded:

> The Fraternal Order of Police is not

engaged in partisan political activity.

> The Policeman's Benevolent Association is, from time to time, engaged in partisan political activity. It may support or oppose candidates for elective office and support or oppose legislation ... It is recognized that its activity, although in support of or opposition to a candidate for elective office, is not determined by the political party to which that candidate belongs. (88A).

As to Question Number 5, Special Master Huot concluded:

> It was not the duty of this Special Master to interpret or apply the statute to either police officers or probation officers. There is no determination by this Special Master that the statute will or will not apply to police locals or probation officer locals of the PBA. The applicability of the statute with respect to the police is the initial function of PERC. The commission will conduct its own investigation into the duties and powers of the members and will make its own determination of whether persons are classified as police or non police. The chairman stated that all cases of this kind are fact sensitive. Generally, the power of arrest, the right/duty to carry a gun, to detect crime, apprehend criminals will be evidence of police activity, however, he could not apply the criteria in the abstract. (89A)

Special Master Huot concluded that:

> Membership in the Fraternal Order of Police or the Policeman's Benevolent Association will not impact the function of probation if the probation officer is an ethical professional with integrity. (90A).

The report of the Special Master was submitted to the Court on April 28, 1994. On July 8, 1994, the New Jersey State Supreme Court (the "respondents: in their official capacity) issued what it characterized as an "administrative ruling." (44A). In the Supreme Court's per curiam decision, the respondents barred petitioners from joining, associating or affiliating with the FOP. (71A-72A). In so doing, the respondents failed to adopt nearly every factual finding offered by the Special Master (who had been appointed by respondents) after five days hearings.

The Court justified its disagreement with the Special Master because the factual evidence was insufficient given the time constraints of the hearing. (45A). The Court differed in its agenda for and assessment of the role of

probation officers. (45A-46A). The Court's unequivocal "statement of basic probation policies" motivating its decision include 1) probation officers must enforce court orders which must be respected and obeyed, notwithstanding lack of resources; 2) cooperation between probation and police is essential, exists today, and is "strongly encouraged" by the Court; 3) probation has become increasingly dangerous, and the safety of officers should be ensured; 4) the punitive function probation cannot be compromised; and 5) probation needs a greater emphasis on rehabilitation. (47A-48A). The primary basis for the Court's ruling was that there is a "fundamental difference" between probation and police organizations. (46A). Probation is viewed as an "integral" arm of the judiciary, and subject to judicial integrity and impartiality – "totally and scrupulously so." (46A). To the contrary, police are viewed as "law enforcement" standing "firmly and properly" on the side of the prosecution. (46A). The enforcement of judicial orders, evidently, is not law

enforcement. The Court concludes that police and probation "are not only different, but incompatible;" that "separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary." (46A) and that integration of the two "would do damage even as it affects probation today" (59A), because they have "adversarial positions" in the Criminal Division. (60A). Consistent with the July 8, 1994 opinion, the AOC issued a directive dated December 7, 1994, which ordered that probation officers who are current members of the FOP may not renew their existing memberships, which "... in any event must be terminated by resignation or otherwise by January 1, 1995."

On December 15, 1994, petitioners Kirchgessner et al. filed a Verified Class Action Complaint and Jury Demand against the justices of the Supreme Court of the State of New Jersey alleging, inter alia, in Count I, a violation of the First Amendment's guarantee of freedom to associate.

On December 15, 194, petitioners moved for a

preliminary injunction in the District Court. In addition to petitioners' suit, the PANJ also filed suit seeking a preliminary injunction, as well, and the matters were consolidated. Respondents (the Chief Justice and the Associate Justices) filed a cross-motion to dismiss for failure to state a claim.

On January 17, 1995, Judge Lechner heard the motion, and on April 28, 1995, he issued an Order which granted the respondents' motion to dismiss the petitioners' causes of action based upon federal law; ordered that supplemental jurisdiction not be exercised as to respondents' causes of action based upon state law; ordered that the cause of action based upon Federal Law alleged by the petitioners be dismissed without prejudice; ordered that the preliminary injunction motion made by petitioners be denied as moot; and ordered that the petitioners' demand for class certification be denied as moot. (41A).

A Notice of Appeal was filed on May 10, 1995.

On July 19, 1996, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the district court. (1A-2A). On August 21, 1996, the Third Circuit denied the petition for rehearing and rehearing in banc. (42A-43A).

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITION FOR CERTIORARI SHOULD BE GRANTED SINCE THE PETITIONERS HAVE ESTABLISHED A VIOLATION OF FIRST AMENDMENT ASSOCIATIONAL AND FREE SPEECH RIGHTS; THE STRICT SCRUTINY TEST SHOULD BE APPLIED; AND EVEN UNDER THE PICKERING/CONNICK BALANCING TEST, THE NEW JERSEY SUPREME COURT'S INTEREST IN THE MAINTENANCE OF AN IMPARTIAL JUDICIARY ODES NOT OUTWEIGH THE PROBATION OFFICERS' INTERESTS IN BEING MEMBERS OF THE FOP

The First Amendment to the United States Constitution guarantees the right of one citizen to associate with other citizens for any lawful purpose free from government interference. Griswold v. Connecticut, 381 U.S. 479, 483, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The First

Amendment also provides, in part: "Congress shall make no law ... abridging the freedom of speech ..." The Fourteenth Amendment extended the scope of the first amendment to protect a citizen's freedom of speech from invasion by the individual states. See Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 83, 9 L.Ed.2d 697 (1963). The Government may not require an individual to relinquish rights guaranteed by the First Amendment as a condition of public employment. Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978). Union membership is protected by the right of association under the First and Fourteenth Amendments. American Federal of State, County, & Mun. Emp. v. Woodward, 406 F.2d 137 (3d Cir. 1967). In Woodward, supra, the issue raised on appeal was whether public employees, discharged because they had joined a labor union, had a right of action under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983 against the public official who discharged them. In Woodward, supra, the defendant

argued that the plaintiffs had no federally protected right to be continued in public employment. The Woodward Court noted that the United States Supreme Court had disposed of this argument in Wieman v. Updegraff, 344 U.S. 183, 191-192, 73 S.Ct. 215, 219 97 L.Ed. 215 (1952), where the Court stated:

> " * * * [T]he facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in United Public Workers, though we held that the Federal Government through the Hatch Act [18 U.S.C.A. Sections 118j, 118l] could properly bar its employees from certain political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' [citations omitted]. We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion * * * is patently arbitrary or discriminatory." Woodward, supra, at 140.

This principle has been repeated by the Supreme Court on a number of occasions. In Beilan v. Board of Public Ed. of Phila., 357 U.S. 399, 405, 78 S.Ct. 1317, 1321, s L.Ed.2d 1414 (1958), the Court stated that "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. * * *" See Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589, 605, 87 S.Ct., 675, 685, 17 L.Ed.2d 629 (1967); Mescall v. Rochford, 655 F.2d 111 (7th Cir. 1981) (a rule of the Chicago Police Department which prohibited the joining or retaining membership in, or soliciting other members to join, any labor organization which was not exclusively limited to full-time law enforcement officers constituted an unconstitutional limitation on the policemen's First Amendment right to freedom of speech and assembly). Petitioners note at this time that the language in the Chicago Police Department Rule is similar to the language in N.J.S.A. 34:13A-5.3. The Court in Mescall concluded that Rule 54A

was unconstitutional. Id., at 113.

In the case sub judice, the respondents have conceded that they had acted in a quasi-legislative fashion in promulgating the regulation in question. As stated in the opinion "Our determination is quasi-legislative, based on the policy consideration noted below ..." (45A). The New Jersey State Supreme Court has acted as a legislative branch of state government, and has unquestionably restricted the First Amendment rights of petitioners to speak freely, advocate ideas, associate with others, and otherwise proceed on behalf of their members. The Court acknowledged that "Associational rights are precious and should not be restricted without reason ..." (68A).

In this case, as in the case of Hughes v. Lipscher, 740 F.Supp. 454 (D.N.J. 1989), there is no sufficiently important state interest justifying the abridgement of the associational interests of New Jersey's probation officers. The Court's violation of petitioners' First Amendment rights cannot

withstand the strict scrutiny normally given to such regulations. As held in Mescall, the reasons for the respondents' decision are not sufficient to outweigh the first amendment rights of the petitioners to be free from arbitrary and overbroad restraints.

Petitioners submit that since the FOP interprets their own Constitution or by-laws to permit membership by probation officers, then that determination cannot and should not be second guessed by the State Supreme Court, acting in a legislative capacity. All private organizations and clubs have the right to define their own membership without state interference, and the only remaining question becomes whether their membership violates existing and constitutionally sound rules of conduct. The recently adopted canons of conduct of judicial employees do not prohibit probation officers from affiliating with the FOP. See, Fraternal Order or Police New Jersey State By-Laws, Article I, Section 2. The State Supreme Court, in its opinion,

acknowledges that "That State FOP's Constitution has a statement that it is not a 'labor union.'" (70A).

Respondents and the district court rely upon the cases of Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, (1983) and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and argue that, under Pickering, the United States Supreme Court has not applied a "strict scrutiny" test to restrictions on speech and associations of public employees. The Pickering and Connick cases are addressed in the recent United States Supreme Court decision in United States v. National Treasury Employees Union, _ U.S. _, 115 S.Ct. 1003 (1995).

In Treasury Employees, the Supreme Court addressed a federal statute (Section 501(b) of the Ethics in Government Act of 1978) prohibiting federal governmental employees from receiving compensation for appearances, speeches or articles. The Court held that the honoraria ban imposes the kind of burden that abridges speech under the First

Amendment. 115 S.Ct. at 1015. The Court held that where the Government employees seek to exercise their right as citizens to comment on matters of public interest, and are not attempting simply to speak as employees upon personal matters, the Government must be able to satisfy a balancing test of the type set forth in Pickering, supra, in order to maintain a statutory restriction on the employees' speech. The Court noted that since the statute in question constitutes a wholesale deterrent to a broad category of expression by a massive number of potential speakers, the Government's burden is even greater than it was in Pickering and its progeny (which usually involved individual disciplinary actions taken in response to particular government employees' actual speech). Specifically, the Government must show that the interest of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression's "necessary impact on the actual operation" of the

Government. 115 S.Ct. at 1014.

The Court in Treasury Employees concluded that although the statute neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on respondents' expressive activity by inducing them to curtail their expression if they wish to continue their employment. Moreover, the ban imposes a far more significant burden on them than on the relatively small group of lawmakers whose past recipient of honoraria assertedly motivated its enactment. The large-scale disincentive to expression also imposes a significant burden on the public's right to read and hear what Government employees would otherwise have written and said. Id. at 114-15. The Court in Treasury Employees concluded that the federal employees expressive activities fell within the protected category of citizen comment on matters of public concern rather than employee comment on matters

related to personal status in the workplace. 115 S.Ct. at 1013. The Court concluded that the Government's burden was greater with respect to this restriction on expression (which chills potential speech before it happens) than with respect to an isolated disciplinary action. Id. at 1014.

Petitioners submit that this is similar to the prohibition imposed by the New Jersey State Supreme Court in the case at bar before any affiliation even occurred.

The Treasury Employees Court found that the Government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression's 'necessary impact on the actual operation' of the Government." Pickering, 15 S.Ct. at 1014. The Government in Treasury Employees argued that the ban on honoraria was necessary since "a wholesale prophylactic rule is easier to enforce than one the requires individual nexus determinations." Id. at 1017.

Petitioners point out that this is a similar position as that taken by the New Jersey Supreme Court, which has utilized a prophylactic prohibition against probation officers becoming members of affiliating with a law enforcement organization because the Court does not believe that the AOC is capable of monitoring the individual probation officers' activities. The Court in Treasury Employees specifically rejected such a blanket ban. As the Treasury employees Court stated: "A blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." id. Special Master Huot, based on the evidence adduced before him, found that "membership in the Fraternal Order of the Police or Policeman's Benevolent Association will not affect the functions of probation." (78A). Moreover, Judge Huot found that "membership in the FOP or PBA will not affect the view of the probationer toward the probation officer." (80A). Since

Judge Huot found that the function of probation would not be affected, and since the view of a probationer toward a probation officer would not be affected by petitioners' affiliation with the FOP, Judge Huot found that there should not be a generalized prohibition against probation officers becoming members or affiliating with organizations such as the FOP. (81A).

In fact, the New Jersey Supreme Court admitted that its prohibition is not based upon any hard evidence, but upon an unsupported belief. The Supreme Court based its decision on nothing more than beliefs, predictions, and conjecture.

As stated above, the United States Supreme Court in the Treasury Employees case specifically ruled that the recited harms sought to be curtailed by the government must be "real, not merely conjectural, and that regulation will in fact alleviate harms in a direct and material way." 115 S.Ct. at 1017.

It is respectfully submitted that this Court should

adhere to the decision in Treasury Employees and reverse the Third Circuit's decision and the decision of the District Court granting of the respondents' motion to dismiss as to Count 1 of the Kirchgessner complaint. Additionally, under the reasoning of Treasury Employees, the preliminary junction should have been granted.

CONCLUSION

Petitioners Robert A. Kirchgessner, Jr., et al. respectfully submit that based upon the foregoing reasons, the petition for certiorari should be granted. The Third Circuit Court of Appeals has interpreted a federal question in a way that conflicts with the decision of this Court in United States v. National Treasury Employees Union, _ U.S. _, 115 S.Ct. 1003 (1995). The appeal also involves a question of exceptional importance, to-wit, the rights of the FOP (and other similar groups) to associate and to free speech.

Respectfully submitted,

_____

ANTHONY J. FUSCO, JR.

Dated: October 17, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5328; No. 95-5329

ROBERT A. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Appellants,

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY,

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 94-05973, 94-06375)
District Judge: Hon. Alfred J. Lechner, Jr.

Submitted Under Third Circuit LAR 34.1(a)
March 11, 1996

Before: NYGAARD, SAROKIN, Circuit Judges, and ALDISERT, Senior Circuit Judge

---

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered August 10, 1995 be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT
(s)_____
Circuit Judge

ATTEST:

(s)_____
T. Douglas Sisk, Clerk
Dated: July 19, 1996

Costs Taxed in Favor of Appellee as follows:
Total for Brief $118.80
Total $118.80

Certified as a true copy and issued in lieu
of a formal mandate on 8/29/96

Teste: (s)
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Alfred J. Lechner, Jr.
Judge

Martin Luther King Jr.
Federal Building & U.S. Courthouse

28 April 1995

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: Robert Kirchgessner, Jr., Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool, Bill Sheeran, Probation Officers/FOP Members on behalf of themselves

and all others similarly situated v. Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hern, Marie L. Garibaldi and Gary S. Stein, in their official capacities as Justices of the Supreme Court of the State of New Jersey
and
Probation Association of New Jersey, a New Jersey Corporation v. Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hern, Marie L. Garibaldi and Gary S. Stein, in their official capacities as Justices of the Supreme Court of the State of New Jersey

Civil Action No. 94-5973 (AJL)

Counsel:

This is a consolidated action consisting of an action brought by seven named probation officers including one Robert Kirchgessner, Jr.[1] (the "Kirchgessner Plaintiffs"), as members of a putative class of all present and future probation officers employed by the State of New Jersey, see Kirchgessner Plaintiffs' Verified Class Action Complaint and Jury Demand (the "Kirchgessner Complaint"), and Exhibits A through C, and an action brought by the Probation Association of New Jersey ("PANJ"), the employee representative for some 1500 probation employees throughout New Jersey. See PANJ's Verified Complaint, Civil Action Number 94-6375 (AJL) (the "PANJ Complaint"), and Exhibits A through D. The Kirchgessner Plaintiffs and PANJ (collectively, the "Plaintiffs") commenced their actions against the seven justices (the "Chief Justice" and the "Associate Justices" or the "Defendants") of the Supreme Court of the States of New Jersey (the "New Jersey Supreme

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[1] The other named plaintiffs include Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool and Bill Sheeran.

Court"), in their official capacities, seeking by way of injunctive relief to enjoin the policy of the New Jersey Supreme Court prohibiting probation officer membership in police organizations. Jurisdiction is alleged pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 and 29 U.S.C. § 102. Kirchgessner Complaint, ¶¶ 2-3; PANJ Complaint, ¶ 4.

On 15 December 1994, the Kirchgessner Plaintiffs made an application for an accelerated return date and a preliminary injunction (the "Preliminary Injunction Application"). See transcript of Preliminary Injunction Application, dated 15 December 1994 (the "Preliminary Injunction Application Tr."). Counsel for the Defendants was given notice of the Preliminary Injunction Application on 14 December 1994. Id. at 3.

In light of the limited opportunity counsel for the Defendants had to present opposition and because the Kirchgessner Plaintiffs sought to enjoin the New Jersey Supreme Court concerning an opinion issued more than five months earlier on 8 July 1994 (the "8 July 1994 Opinion"), attached as Exhibit A to the Kirchgessner Complaint and Exhibit C to the PANJ Complaint, the Preliminary Injunction Application was denied on 15 December 1994. Preliminary Injunction Application Tr. at 3-5. The Kirchgessner Plaintiffs were instructed to proceed with their motion for injunctive relief pursuant to Rule 12N, Appendix N of the General Rules Governing the United States District Court for the District of New Jersey. Id. at 4-6.

On 3 January 1995, PANJ filed an order to show cause (the "Order to Show Cause"), seeking a declaratory judgment, preliminary and permanent injunction against the Chief Justice and the Associates Justices in connection with the 8 July 1994 Opinion. A letter was forwarded to counsel for PANJ, with copies to counsel for the Kirchgessner Plaintiffs and counsel for the Defendants, dated 4 January 1995 (the "4 January 1995 Letter") stating:

> As explained on 15 December 1994 to counsel in the Kirchgessner matter, based upon

> the chronology of the events related to these cases, as well as the timing of the applications for injunctive relief, ... there is no reason to proceed in an emergent manner. The relief sought requires deliberate action and the [D]efendants should have a fair and adequate opportunity to respond to a request for injunctive relief, as sought in each of these matters.

4 January 1995 Letter at 2. Additionally, the 4 January 1995 Letter advised that it was the court's inclination to consolidate the matters and have the Kirchgessner Plaintiffs and PANJ jointly brief the injunctive relief issue to avoid a duplication of effort. Id.

At a status conference, dated 12 January 1995, the action commenced by PANJ, was consolidated with the matter filed by the Kirchgessner Plaintiffs. See Order of Consolidation, dated and filed 12 January 1995. Thereafter, a return date and hearing were scheduled for 17 April 1995 (the "17 April Hearing"). See transcript of the 17 April Hearing, dated 17 April 1995 (the "17 April Hearing Tr.").

Currently before the court is the Plaintiffs' motion for a preliminary injunction to enjoin the New Jersey Supreme Court., the Chief Justice and the Associate Justices, from enforcing a policy, as articulated in the 8 July 1994 Opinion; this policy prohibits probation officer membership in law enforcement organizations. Also before the court is the cross-motion by the Chief Justice and the Associate Justices to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)").[2]

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[2] In support of their motion for a preliminary injunction and in opposition to the motion to dismiss by the Chief Justice and the Associate Justices, the Plaintiffs submitted: PANJ's Supplemental Brief in Support of Order to Show Cause for Preliminary Injunction (the "PANJ Brief")' Brief in Support of

For the reasons set forth below, the motion by Plaintiffs for a preliminary injunction is denied. The cross-motion by the Chief Justice and the Associate Justice to dismiss is granted as to the Plaintiffs' Federal causes of action; supplemental jurisdiction is not exercised concerning the Plaintiffs' state law causes of action.

Facts

In October and November 1993, PANJ passed a referendum to affiliate itself with the Policeman Benevolent Association of New Jersey (the "State PBA"). PANJ Complaint, ¶ 28. In September of 1994, the State PBA agreed to become

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Kirchgessner Plaintiffs' Motion for a Preliminary Injunction (the "Kirchgessner Brief"); Reply Brief of Plaintiff, Probation Association of New Jersey's Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint (the "PANJ Reply Brief:); Reply Brief in Support of Kirchgessner Plaintiffs' Motion for a Preliminary Injunction and in Opposition to Defendant's Motion to Dismiss Plaintiffs' Complaint (the "Kirchgessner Reply Brief"); Kirchgessner Plaintiffs' Appendix; Affidavit of Rich Walen; Affidavit of Maureen Cool; Affidavit of George Christie in Support of Plaintiff Probation Association of New Jersey's Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint; Plaintiff Probation Association of New Jersey's Appendix in Support of Order to Show Cause for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Plaintiff's Complaint, Volumes I and II.

In opposition to Plaintiffs' motion for preliminary injunction and in support of their motion to dismiss, the Chief Justice and the Associate Justices submitted: Brief in Support of Motion to Dismiss and in Opposition to Motion for Preliminary Injunction (the "Defendants Brief"); Defendants' Letter Brief Addendum in Support of Motion to Dismiss and Opposition to Motion for Preliminary Injunction (the "Defendants Addendum"); Affidavit of Mark A. Rosenbaum.

affiliated with the PANJ, if such affiliation was not prohibited by law. Id., ¶ 30. Additionally, many of the Plaintiffs were, at that time, members of the Fraternal Order of Police (the "FOP"). Kirchgessner Complaint, ¶¶ 9-14; PANJ Complaint, ¶ 32.

On 3 March 1994, in response to a request made by the Chief Probation Officers' Association, the New Jersey Supreme Court announced it would review its longstanding policy prohibiting probation officer membership in law enforcement organizations, namely the State PBA and the FOP. See Letter from the New Jersey Supreme Court, dated 3 March 1994 (the "3 March 1994 Letter"), attached as Exhibit A to the PANJ Complaint at 1. The New Jersey Supreme Court appointed retired Superior Court Judge Paul R. Huot, as a special master (the "Special Master"), to develop a factual record to aid in its review of this matter. Id.

In the 3 March 1994 Letter, the New Jersey Supreme Court explained: "In the meantime, the present policy remains in effect: probation officers shall not become members of any law enforcement organization.... [F]or the time being the policy shall not require those probation officers who are currently members of [the] FOP to resign." Id. at 1-2. Additionally, the 3 March 1994 Letter stated: "The [Supreme Court of New Jersey] wishes to make clear that it recognizes the probation officers' constitutional right to have representatives of their own choosing in connection with collective negotiations." Id. at 2.

A. The Report of the Special Master

On 28 March 1994, the Special Master issued his report (the "Report of the Special Master"), attached as Exhibit B to the Kirchgessner Complaint and the PANJ Complaint, concerning probation officer membership in law enforcement organizations and the proposed affiliation of PANJ with the State PBA. According to the Special Master, there were five questions submitted by the New Jersey Supreme Court for which it sought a factual record and recommended findings of fact. Report of the Special Master at 2. These questions were:

(1) What impact, if any, will membership of probation officers in the [State PBA] or the [FOP] have on the probation function?

(2) Will the affiliation of PANJ with the State PBA result in membership in the PBA of probation officers who are members of PANJ?

(3) What is the present number of probation officers who are members of the FOP and what have their activities been in connection with that organization?

(4) To what extent, if any, may probation officers become involved in or be seen as supporting political activity as a result of membership in either [the State PBA] or [the FOP]?

(5) Does the legislation (N.J.S.A. [§] 34:13A-5.3) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non police to membership [sic] imply any legislative policy related to the potential impact on non-police members of such an organization?

Id.

The Report of the Special Master explained:

This report does not and the assignment of th[e] [S]pecial [M]aster was not intended to make findings concerning the question of whether a probation officer was a "law enforcement officer", nor the question of the propriety or right of any "union" to be a representative for collective bargaining purposes of probation

> officers nor the question of the right of probation officers to join any particular union.

Id. (emphasis in original).

With regard to the impact of membership in police organizations on the probation function, the Special Master determined that the testimony he heard and the evidence submitted "[were] not such that a true factual determination can be made." Id. at 3. According to the Special Master: "While a far more detailed and intense study would be required to come to a fully sustainable conclusion based upon empirical data rather than opinions, it would appear that membership in the [State PBA] or [the FOP] will not affect the functions of probation." Id. at 5 (emphasis added).

The Special Master explained that there "is no evidence one way or the other" concerning the impact on the function of probation, as well as on the impact on individual probation officers from police officer association membership. Id. at 5-6. Instead, the Special Master stated these determinations turn upon the decision maker's view of human nature

> as able to withstand the subtle bribery of friendship or steadfastness in living up to the moral and ethical standards required by a particular employment ... [and] [t]he belief in the professionalism or lack thereof of probation officers as a whole, or an individual probation officer, in the performance of duty and adherence to oath.

Id.

The Special Master was similarly unable to make a generalized determination concerning the impact of joining a police officer association upon the neutrality of probation officers. Id. at 7. The Special Master rejected testimony regarding the enhanced cooperation and coordination with law enforcement agencies which would result from membership in

the State PBA or the FOP becuase there was already evidence of such cooperation without probation officer membership in the State PBA or the FOP. Id.

The Special Master concluded that affiliation with the State PBA would subject probation officers to the control and regulations of the State PBA. Id. at 10. "Probation Officers may be placed in a position of supporting or opposing political candidates or legislation which may or may not be in the best interest of probation officers." Id. Additionally, the Special Master found affiliation with the State PBA could create a conflict of interest if, for example, the state offers a reward for the arrest and conviction of a defendant convicted of assaulting or killing a State PBA member. Id. The Special Master, however, explained:

> This, again is an area where the individual integrity and professionalism of the officer is involved. There is no determination that such membership and such action on the part of the State PBA would cause any officer to fail to properly perform his [or her] duties, it is merely the recognition of a possible consequence of affiliation.

Id. at 10-11.

The Special Master determined there are between 700 and 800 probation officers who are members of the FOP, and have been so for twenty years. Id. at 13. The Special master pointed out that the by-laws of the FOP provides it "is strictly non-political and shall have no affiliation with any union or political action committee." Id. at 14. According to the Special master, there was no evidence presented with respect to the nature and quality of the activities of the members of the FOP other than that they participate in social, non-political and non-

labor oriented activities.[3] Id. The Special Master determined the FOP is not engaged in partisan political activity. Id. at 15.

The Special Master found that the State PBA does, on occasion, engage in partisan political activity. Id. The State PBA "may support or oppose candidates for elective office and support or oppose legislation." Id.

The Special Master then addressed whether N.J.S.A. § 34:13A-5.3 which prohibits police officers from joining an employee organization which admits non-police officers, implies

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[3] By letter, dated 11 April 1995 (the "11 April 1995 Letter"), counsel for the Defendants forwarded certain correspondence between the Administrative Office of the Courts of the State of New Jersey (the "AOC") and the Public Employees Relations Commission ("PERC"). According to an attached letter from PERC to the AOC, dated 17 March 1995, the New Jersey FOP Coalition of Probation Officers' Lodges sought to intervene on behalf of probation officers as labor representative in a labor dispute. As counsel for the Defendants point out, the above-referenced correspondence is an "indication that there is some faction of the [FOP] which seeks to be certified as a labor organization representing probation officers." 11 April 1995 Letter.

At the 17 April Hearing, the Plaintiffs explained:

> [R]egardless of whether [the FOP is] engaging in union activities or not, ... the issue is still the same in terms of their freedom of association. Is that activity going to disrupt the operation of Government in fact or appearance? ... [We have] never stated that the FOP has never engaged in union activities. In fact, they have engaged in activities for many years in terms of representing their members in disciplinary hearings before police departments and so on.

17 April Hearing Tr. at 24.

any legislative policy concerning non-police officers joining police officer organizations. Report of the Special Master at 16.

The Special Master explained that, according to the testimony of the Chairman of PERC, the purpose of the statute is to have collective bargaining without divided loyalties and to avoid problems which could arise if police and non-police were members of the same bargaining unit. Id. Summarizing PERC's position, the Special Master stated: "Police are to protect person and property, even in a labor dispute. The divided loyalty could arise if a police [officer] was a member of the same union as the employee who was on strike against a non[-]public employer." Id.

According to the Special Master, the determination of whether persons are classified as police or non-police under the statute is the function of PERC. Id. The Special Master explained that "PERC's jurisdiction does not extend to the employees of the judicial branch of government[,]" and that it was not his)the Special Master's) duty to interpret or apply the statute to either police officers or probation officers. Id.

B. The 8 July 1994 Opinion

In the 8 July 1994 Opinion the New Jersey Supreme Court reaffirmed its policy of prohibiting probation officer membership in law enforcement organizations, the State PBA and the FOP in particular, 8 July 1994 Opinion at 5. The New Jersey Supreme Court explained that the 8 July 1994 Opinion was "quasi-legislative, based on ... policy considerations[,] ...[its] knowledge of the subject matter[,] ...[and] derived from [its] responsibility for, ... authority over, ... involvement with and ... regular and continuing regulation and oversight of the Probation Division and its functions and operations."[4] Id. at 2. The New

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[4] By letter, dated 17 April 1995 (the "17 April Letter"), counsel for the Defendants explains:

Jersey Supreme Court did not adopt all of the Special Master's findings, although explaining that its "disagreement [was] not fact-specific, for as [the Special Master] notes the evidence was largely insufficient ... to reach any such determinations (or as the Special Master noted concerning the central question before us, the evidence was 'not such that a true factual determination can be made'_." Id. at 3.

According to the New Jersey Supreme Court:

> Our decision rests on the fundamental difference between probation and police organizations. Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may, and cannot be perceived as taking sides any more than a court may. ... It has no more right to become allied with a public

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> With respect to probation officers, N.J.S.A. [§] 2A:168-5 provides that their appointment shall be made by the Assignment Judge of the Superior Court in each county. Although, until recently, probation officers were technically on the payroll of the various counties, they have always been subject to supervision by the [j]udiciary, Moreover, pursuant to the State Judicial Unification Act, "judicial employee" is defined as including any person employed by a county probation office, N.J.S.A. 2B:10-3, and as of January 1, 1995, all such employees are on the State's payroll. N.J.S.A. 2B:10-4.

17 April Letter at 1.

> defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.
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> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice -- the prosecution's side.
>
> Put simply, the functions of police and probation -- one serving the prosecution the other serving the courts -- are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary.

Id. at 3-4.

Consistent with the 8 July 1994 Opinion, the AOC issued a directive, dated 7 December 1994, requiring all probation officers to terminate FOP membership by 1 January 1995 and prohibiting affiliation of PANJ with the State PBA. See Exhibit C to the Kirchgessner Complaint; Exhibit D to the PANJ Complaint.

c. The Complaints in the Instant Action

The Kirchgessner Complaint consists of six counts. Count One alleges the ban on probation officer membership in the FOP violates the Kirchgessner Plaintiffs' right to freely associate, as guaranteed by the First Amendment to the United States Constitution. Kirchgessner Complaint, ¶¶ 41-42. Count two alleges the prohibition on FOP membership is a deprivation of a property right without due process, as guaranteed by the

Fourteenth Amendment to the United States Constitution. Id., ¶¶ 43-44. Count three alleges the Chief Justice and the Associate Justices acted under color of state law to deprive the Kirchgessner Plaintiffs rights guaranteed under the Constitution in violation of section 1983 of title 42 of the United States Code. Id., ¶¶45-46. Count four alleges a violation of the Norris-LaGuardia Act, 29 U.S.C. § 101 et. seq., by denying the Kirchgessner Plaintiffs their rights to freedom of association, self-organization and designation of representatives of their own choosing. Id. ¶ 47. Count five alleges a deprivation of rights, as provided by the New Jersey State Constitution, Art. 1, ¶ 19, because the prohibition on joining the FOP is a deprivation of the Kirchgessner Plaintiffs' rights to organize through representatives of their own choosing as public employees. Id., ¶¶ 48-49. Count six alleges that forbidding membership in the FOP deprived the Kirchgessner Plaintiffs of their rights to join and assist any employee organization, as provided by N.J.S.A. § 34:13A-5.3.

The PANJ Complaint consists of four counts and parallels the first, third, fifth and sixth counts of the Kirchgessner Complaint except that it focuses on the ban concerning affiliation with the State PBA. The PANJ Complaint alleges violations of the First and Fourteenth Amendments to the United States Constitution in count one. PANJ Complaint, ¶¶ 46-47. Count two alleges a violation of section 1983 of title 42 of the United State Code. Id., ¶¶48-49. Count three alleges a deprivation of rights, as provided by the New Jersey State Constitution, Art. 1, ¶ 19. Id., ¶¶ 50-52. Count four alleges a violation of N.J.S.A. § 34:13A-1 et seq. Id., ¶¶ 52-53.

Discussion

A. Standard For Dismissal Under Rule 12(b)(6)

Because granting a motion under Rule 12(b)(6) can result in a dismissal at an early stage of a plaintiff's case, all allegations of a plaintiff must be taken as true and all reasonable factual inferences drawn in his or her favor. Gomez

v. Toledo, 446 U.S. 635, 636 (1980); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994); Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991); Unger v. National Residents Matching Program, 928 F.2d 1392, 1395 (3d Cir. 1991); Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Melikian v. Corradetti, 791 F.2d 274, 277 (3d Cir. 1986). Nevertheless, legal conclusions made in the guise of factual allegations are not given a presumption of truthfulness. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Haase v. Webster, 807 F.2d 208, 215 (D.C.Cir. 1986); Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983); Western Mining Council v. Watt, 643 F.2d 618, 626 (9th Cir.), cert. denied, 454 U.S. 1031 (1981); Bermingham v. Sony Corp. of Am., 820 F.Supp. 834, 846 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3d Cir. 1994).

A court may dismiss a complaint for failure to state a claim where it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd., __U.S.__, 113 S.Ct. 2891, 2917 (1993); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Piecknick, 36 F.3d at 1255; ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Jordan, 20 F.3d at 1261; Unger, 928 F.2d at 1395; Markowitz, 906 F.2d at 103; Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988); Angelastro v. Prudential-Bache Secur., Inc., 764 F.2d 939, 944 (3d Cir. 1985), cert. denied, 474 U.S. 935 (1985).

A Federal court reviewing the sufficiency of a complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his], her or its] claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Estate of Bailey v. County of York, 768 F.2d 503, 506 (3d Cir. 1985); Bermingham, 820 F.Supp. at 846.

Applying these principles to the instant action, the

inquiry is whether the allegations made by the Plaintiffs in the Kirchgessner Complaint and the PANJ Complaint are sufficient, so as to entitle them to offer evidence in support of such allegations.

B. Standard of Review for First Amendment Restrictions Placed on Public Employees

"Even though [the Plaintiffs] work for the Government, they have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.'" United States v. National Treasury Employees Union, __U.S.__, 115 S.Ct. 1003, 1012 (1995)(quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)). Nonetheless, as the National Treasury Court explained: "In Pickering and a number of other cases we have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." Id. at 1012.

When making a determination concerning the validity of restraints placed on public employees, a court"must 'arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matter of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Id. at 1012 (quoting Pickering, 391 U.S at 568); see also Waters v. Churchill, ___U.S.___, 114 S.Ct. 1878, 1884 (1994) (plurality opinion)("[t]o be protected, the speech must be on a matter of public concern, and the employee's interest in expressing [himself or]herself on the subject must not be outweighed by any injury the speech could cause: to the Governmental interest of promoting efficiency of its public services (citing Connick v. Myers, 461 U.S. 138, 142 (1983)); Swineford v. Snyder County Pa., 15 F.3d 1258, 1272 (3d Cir. 1993)(citing Pickering and Connick and explaining its inquiry as "whether the [government's interests in proper departmental management outweighed [plaintiff's] interest in commenting on matters of public concern").

As the Supreme Court explained in Waters:

> The key to First Amendment analysis of government employment decisions, then is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters, 114 S.Ct. at 1888.

In National Treasury, the Court explained that it "applied Pickering's balancing test only when the employee spoke 'as a citizen upon matters of public concern; rather that 'as an employee upon matters only of personal interest.'" National Treasury, 115 S.Ct. at 1013 (quoting Connick, 461 U.S. at 147) According to the Court, an employee's private speech can give rise to discipline while imposing no special burden of justification on the government employer. Id.

With regard to speech involving a matter of public concern, the government has a burden to justify its adverse employment action. Id. Nonetheless, the Court "has consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." Waters, 114 S.Ct. at 1887; see also Connick, 461 U.S. at 151 ("'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs'" (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)).

Whether a public employee's speech addresses a matter of public concern is determined by the content, form and

context of such statement. Connick, 461 U.S. at 148. "The inquiry into the protected status of speech is one of law, not fact." Id. at n.7.

In National Treasury, the Supreme Court explained that cases where it has 'applied Pickering's balancing test" have generally involved disciplinary actions taken by a government employer in response to an employee's speech. 115 S.Ct. at 1012-13. In the instant action, the Plaintiffs argue that because "[h]ere the issue is not one of freedom of speech, but rather one of freedom of association ... the more stringent standard of strict scrutiny must be applied." PANJ Reply Brief at 9 (arguing the New Jersey Supreme Court policy "'cannot be justified upon a mere showing of legitimate State interest; ... [rather it] must be 'paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.'" (quoting Elrod v. Burns, 427 U.S. 347, 362 (1976)); see also Kirchgessner Reply Brief at 1-2 ("the freedom to associate (along with the freedom of speech) is at issue ... the United States Supreme Court has, in fact, applied the more stringent standard of strict scrutiny where the freedom of association is at issue[;] ... Plaintiffs submit that under Elrod v. Burns, the strict scrutiny test must be applied").

Notwithstanding the Plaintiffs' assertions, reliance on Elrod is misplaced. Elrod involved the discharge or threat of discharge of public employees because of their partisan political affiliation or non-affiliation. Elrod, 427 U.S. at 349. According to the Court, Elrod and Branti v. Finkel, 445 U.S. 507 (1980)., "decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless the party affiliation is an appropriate requirement for the position involved." Rutan v. Republican Party, 497 U.S. 62, 64 (1990). The instant action, therefore, is distinguishable from Elrod and its progeny. Accordingly such line or precedent does not require the application of the "strict scrutiny" test to the

case at bar.[5]

The Pickering/Connick balancing test developed from cases which, lie the instant action, alleged violations of public employees' associational rights. The Connick Court explained:

> In all of these cases, the precedents in which Pickering is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive."

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[5] To further support their argument for the application of the "strict scrutiny" test, the Plaintiffs rely upon Labov v. Lalley, 809 F.2d 220, 222-23 (3d Cir. 1987), Mescall v. Rochford, 655 F.2d 111 (7th Cir. 1981), Vorbeck v. McNeal, 407 F.Supp. 733 (E.D.Mo. 1976), Police Officers Guild, Nat'l Union of Police Officers v. Washington, 396 F.Supp. 543 (D.D.C. 1973) and Atkins v. City of Charlotte, 296 F.Supp. 1068 (W.D.C.C. 1969). Kirchgessner Brief at 8-10; Kirchgessner Reply Brief at 2; PANJ Brief at 7-13; PANJ Reply Brief at 9. These cases are distinguishable from the instant action and, therefore, provide no controlling, or persuasive, authority for the Plaintiffs' position.

As counsel for the Defendants point out, in none of these cases did the courts apply the Pickering/Connick balancing test, because such test was inapplicable. In each the courts reviewed restraints placed on the rights of employees to join unions and collectively bargain. Defendants Brief at 16. The Supreme Court of New Jersey "is merely prohibiting affiliation with police organizations, whether or not the organizations happens to be a union. The [8 July 1994 Opinion] merely affirmed a longstanding policy which in no way targeted unionization." Id. at 17.

Connick, 461 U.S. at 144-45 (emphasis added). The history of the Pickering/Connick balancing test, therefore, provides further support for its application in the instant case where associational rights are implicated.[6] Accordingly, the Pickering/Connick balancing test, not "strict scrutiny" will be applied in the instant case.

C. Application of the Pickering/Connick Balancing Test to the Instant Action

The Plaintiffs argue even under the Pickering/Connick balancing test, the governmental interest of maintaining impartiality in appearance and in fact, which under lies the ban on probation membership in law enforcement organizations, does not outweigh the Plaintiffs' interest in affiliating with the State PBA or the FOP. Kirchgessner Reply Brief at 3; PANJ Reply Brief at 10. Plaintiffs argue the instant ban on probation membership in law enforcement organizations is analogous to the ban struck down in National Treasury becuase it is a broad based prophylactic rule. Kirchgessner Reply Brief at 6; PANJ Reply Brief at 12.

At issue in National Treasury was the constitutionality of a subsection of the Ethics in Government Act which prohibited Federal employees from accepting any compensation for delivering speeches or writing articles. National Treasury, 115 S.Ct at 1008. The ban in National Treasury "applie[d] even when neither the subject of the speech or article nor the person or group paying for it ha[d] any connection with the employee's official duties." Id.

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[6] Additionally, associational rights derive from other First Amendment rights including freedom of speech. Roberts v. United States Jaycees, 468 U.S. 609, 618, 622 (1984) ("[t}he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion.").

According to the Court:

> The Government's underlying concern is that [F]ederal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful, but the Government cites no evidence of misconduct, related to honoraria in the vast rank and file of [F]ederal employees....

Id. at 1015-16. In striking the ban, the Court explained that absent a nexus limitation between speech and an employees official duties, "[a] blanket burden on the speech of 1.7 million [F]ederal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." Id. at 1017.

Plaintiffs argue the Chief Justice and the Associate Justices cannot, as the Court required in National Treasury, ""demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate harms in a direct and material way."" PANJ Reply Brief at 12 (quoting National Treasury, 115 S.Ct. at 1017 (quoting Turner Broadcasting System, __U.S.__, 114 S.Ct. 2445, 2450 (1994)). Plaintiffs argue, despite the opportunity to present evidence to the Special Master over the five days of hearings on this matter, the Chief Justice and the Associate Justices "could not point to any specific evidence ... to support [the] claim that the 'risk' to impartiality grants them carte blanche to infringe upon First Amendment rights." PANJ Reply Brief at 11. Further, the Plaintiffs argue the Special Master "concluded that there cannot be a generalized prohibition against probation officers becoming members of or being affiliated with law enforcement organizations." Id.

The ban on law enforcement membership by probation officers is distinguishable from the ban in National Treasury. As discussed, the ban in National Treasury prohibited speech even when it had no relationship to a Federal employee's

official duties. National Treasury, 115 S.Ct. at 1008. As counsel for the Defendants point out:

> [I]n this case the New Jersey Supreme Court's ban on probation officer membership in police organizations is directly related to probation officers' employment. That is, as employees of the Judiciary, they must maintain their impartiality, in appearance and in fact. Their membership in an organization which is aligned with one side in the adversary process is inconsistent with the requirement of such impartiality.

Defendants Addendum at 3.[7]

In the instant action, the issue is not merely whether any individual probation officer will in fact lose his or her ability to be impartial as a result of law enforcement association membership. Instead, the harm which has been articulated is the appearance of partiality from permitting probation officers, who are part of the judiciary, to join the ranks of law enforcement.[8] As argued at the 17 April Hearing, the

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[7] The reason articulated by the Plaintiffs for their desire to affiliate with law enforcement associations verifies the concerns of the Chief Justice and the Associate Justices. "Affiliation with the State PBA will foster more professional and collaborative working relationships between probation officers, parole and police officers, which is vital to a strong and efficient criminal justice system." PANJ Brief at 2.

[8] As counsel for the Defendants explained:

> Historically, the primary function of probation has been the enforcement of court orders, including the conditions of probation. This function includes, in appropriate circumstances, the presentation of probation violation reports

governmental interest underlying the 8 July 1994 Opinion is the avoidance of partiality and conflict both in fact and appearance. See 17 April Hearing Tr. at 5-6.[9]

Maintaining the appearance of impartiality of the judiciary is an interest of vital importance.[10] United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548, 564 (1973). In United States Civil Sev. Comm'n, the Court applied Pickering to uphold the constitutionality of the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibited Federal

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> to judges. This central function includes both punitive and rehabilitative components which must be balanced by the probation officer. More recently, other critical functions have been added to the responsibilities of probation officers such as case management functions including investigating for and preparing pre-sentence reports, bail reports and pretrial intervention reports, all of which are used by judges in making judicial decision.

Defendants Brief at 5-6 (citations omitted).

With regard to the function of probation officers, the Plaintiffs state: "[T]he issue here is probation officers' constitutional First Amendment right to become members of or affiliate with law enforcement organizations of their choice. Whether the probation function is primarily rehabilitative or punitive is irrelevant to this constitutional analysis." PANJ Reply Brief at 5.

[9] At the 17 April Hearing the Plaintiffs conceded that there was nothing "more important than the need for the judiciary to not only be impartial but to appear impartial." 17 April Hearing Tr. at 7.

[10] As noted, the Plaintiffs do not contest this. See supra note 9.

employees from taking an active role in partisan political activities. 413 U.S. at 564.

The Court explained that "[n]either the right to associate nor the right to participate in political activities is absolute in any event." Id. at 567. The employees of the Executive Branch

> are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government -- the impartial execution of laws -- it is essential that [F]ederal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. ...
>
> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also crucial that they appear to the public to avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Id. at 565 (emphasis added).

As was explained at the 17 April Hearing, and conceded by the Plaintiffs, when weighing the competing interests between a public employer's need to have wide discretion in running an efficient operation and the speech and associational rights of its employees, the judiciary has greater concerns of maintaining its impartiality both in appearance and in fact than other branches of government. 17 April Hearing Tr. at 12-14. As explained at the 17 April Hearing:

> [T]he judiciary and each of the employees of the judiciary, not only has to be impartial, not only has to avoid conflict in fact, but has to make sure [to] avoid the appearance of ... any partiality or any conflict. It seems that because of the separation of powers, the judiciary has to be self-policing in many respects.

Id. at 14.

Despite the Plaintiffs' argument to the contrary, it does not appear that the New Jersey Supreme Court's ban on law enforcement membership was, or is, at odds with the findings of the Special Master.[11] As indicated, the New Jersey Supreme Court explained that, it did not adopt all of the findings of the Special Master. 8 July Opinion at 3. Nonetheless, as the New Jersey Supreme Court pointed out, the Special Master found "the evidence was 'not such that a true factual determination [could] be made.'" Id. (quoting the Report of the Special Master at 3).

Further, while the Chief Justice and the Associate Justices did not point to specific evidence of impartiality by probation officers, the Special Master repeatedly indicated that there was "no evidence one way or the other" and that he was unable to make any generalized determinations. Report of the Special Master at 5-7. At the 17 April Hearing the Plaintiffs again pointed to lack of "empirical" or "objective" evidence to support the 8 July 1994 Opinion. 17 April Hearing Tr. at 15-18 (although [the Plaintiffs] wouldn't say the [New Jersey} Supreme Court took its views out of thin air, [we] can say there is just no basis for it, except theory"). As also explained at the 17 April Hearing:

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[11] It is unclear why the adherence, or lack thereof, to the Report of the Special Master is of significance to the instant analysis. In any event, this issue is addressed because the Plaintiffs have raised it numerous times in their briefs and at the 17 April Hearing.

> [T]he only way you could have empirical data is when partiality is developed, when conflict is developed and at that point it is too late, the system is brought down under its own weight ... there can[not] be any basis, other than for theory unless the system went so awry, unless the system was so rife

with corruption or partiality that it [the evidence] would [then] be[come] objective....

> What makes the judiciary viable in any governmental setting is th[e] distance that impartiality and the appearance of impartiality ... [create and which] people can rely upon....

Id. at 15-18. Cf. Waters, 114 S.Ct. at 1887 ("Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.")

The Chief Justice and the Associate Justices made a reasonable determination that membership by probation officers in the State PBA and the FOP will impair the impartiality of the judiciary in fact and appearance. It appears this harm is "real" and "not merely conjectural." National Treasury, 115 S.Ct. at 1017. Further, the interest in maintaining the appearance of impartiality of the judiciary outweighs the desire of the Plaintiffs to affiliate with law enforcement organizations.[12]

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[12] As previously quoted:

> Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may, and cannot be perceived as taking sides any

Dismissal, pursuant to Rule 12(b)(6), of the Plaintiffs' claims under the First Amendment is appropriate. As argued by counsel for the Defendants, in light of the "paramount interest in maintaining an independent and impartial [j]udiciary, the prohibition of probation officer membership in police organizations is of the type that a public employer may reasonably place on its employees...." Defendants Brief at 9. See National Treasury, 115 S.Ct. at 1012; Waters, 114 S.Ct. at 1888; Connick, 461 U.S. at 142; Pickering, 391 U.S. at 568; Swineford, 14 F.3d at 1272. Moreover, it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of First Amendment violations, as set forth in the Kirchgessner Complaint and the PANJ Complaint. Hartford Fire, 113 S.Ct. at 2917; Hishon, 467 U.S. at 73; Conley, 355 U.S. at 45-46;

> more that a court may. ... It has not more right to become allied with a public defender's office than with prosecutors or police. Probation represents to special interest in society and government but one: the courts.
>
> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice -- the prosecution's side.

8 July 1994 Opinion at 4.

Piecknick, 36 F.3d at 1255; ALA, 29 F.3d at 859; Jordan, 20 F.ed at 1261; Unger, 928 F.2d at 1395; Markowitz, 906 F.2d at 103; Ransom, 848 F.2d at 401; Angelastro, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs' claims under the First Amendment, as alleged in counts one of the Kirchgessner Complaint and the PANJ Complaint, is granted pursuant to Rule 12(b)(6).

D. Other Federal Claims

As indicated, in addition to their First Amendment claims, Plaintiffs also allege the New Jersey Supreme Court policy violated their due process rights under the Fourteenth Amendment, the Norris-LaGuardia Act, and section 1983 of title 42 of the United States Code (collectively, the "Federal Claims").

1. Due Process

Plaintiffs allege in count two of the Kirchgessner Complaint and in count one of the PANJ Complaint the Chief Justice and the Associate Justices, by their ban on affiliation with law enforcement organizations, have deprived the Plaintiffs of a property right without due process as guaranteed by the Fourteenth Amendment to the Untied States Constitution. Kirchgessner Complaint, ¶¶ 43-44; PANJ Complaint, ¶¶ 46-47.

The determination of whether a plaintiff has adequately alleged a violation of the Fourteenth Amendment's Due Process Clause involves two steps. First, it must be determined whether Plaintiffs have alleged interference with a protected liberty interest. See Meachum v. Fano, 427 U.S. 215, 223 (1976); Stephany v. Wagner, 835 F.2d 497,499 (3d Cir. 1987), cert. denied, 487 U.S. 1207 (1988); Mims v. Shapp, 744 F.2d 946, 949 (3d Cir. 1984). Second, it must be determined whether the procedures employed by the state to protect that liberty interest were constitutionally inadequate. see Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Mims, 744 F.2d at 949.

With respect to the first of these steps, the Supreme

Court has stated: "Liberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause itself and the laws of the states." Hewitt v. Helms, 459 U.S. 460, 466 (1983); see Board of Pardons v. Allen, 482 U.S. 369, 373 (1987); Stephany, 835 F.2d at 499.

The Plaintiffs have not alleged a protected liberty interest nor that such interest was deprived without due process of law. The Plaintiffs argue if they do not follow the policy of the New Jersey Supreme Court, "they are threatened with termination from their jobs.... Such termination clearly threatens the]P]laintiffs' property interest." Kirchgessner Brief at 11. As counsel for the Defendants pointed out: "[P]laintiffs do not allege ... that if any probation officers are terminated for a violation of the policy that they would not be given a hearing on that action. It is the termination of employment which must be attended by due process, not the announcement of the policy." Defendants Brief at 32-33.

It appears, therefore, beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of due process violations, as set forth in the Kirchgessner Complaint and the PANJ Complaint.[13] hartford Fire, 113 S.Ct. at 2917; Hishon, 467

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[13] Plaintiffs also content their due process rights were violated by the New Jersey Supreme Court "by deciding this case since the circumstance impose a risk of bias or prejudice on the part of the [New Jersey] Supreme Court (which acted as both participant-respondent and the purported-arbiter)." Kirchgessner Brief at 12. Plaintiffs argue: "'[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.'" Kirchgessner Brief at 12 (quoting Schweiker v. Mclure, 456 U.S. 188, 195 (1982)). As mentioned, however, the 8 July 1994 Opinion was issued by the New Jersey Supreme Court in its "quasi-legislative" capacity. 8 July 1994 Opinion at 2.

Plaintiffs do not appear to contest that the 8 July 1994

U.S. at 73; Conley, 355 U.S at 45-46; Piecknick, 36 J.3d at 1255; ALA, 29 F.3d at 859; Jordan, 20 F.3d at 1261; Unger, 928 F.2d at 1395; Markowitz, 906 F.2d at 103; Ransom, 848 F.2d at 401; Angelastro, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs' claims under the Fourteenth Amendment, as alleged in count two of the Kirchgessner Complaint and count one of the PANJ Complaint, is granted pursuant to Rule 12(b)(6).

2. Norris-LaGuardia Act

Count four of the Kirchgessner Complaint alleges a violation of the Norris-LaGuardia Act, 29 U.S. C. § 101 et. seq., by denying the Kirchgessner Plaintiffs their rights to freedom of association, self-organization and designation of representatives of their own choosing. Kirchgessner Complaint. ¶ 47. The Norris-LaGuardia Act provides:

> No court of the United States shall have jurisdiction to issue any restraining order or ... injunction ... to prohibit any person or persons participating ... whether singly or in concert ... from ... [among other things] refusing to perform any work [and] ... [a]ssembling peaceably to ... organize ... in promotion of their

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Opinion was "quasi-legislative." Instead, according to Plaintiffs: "to argue that due process (which is, in essence, fairness) is inapplicable to the [New Jersey] Supreme Court is improper and misguided." Kirchgessner Reply Brief at 11. Plaintiffs have provided no authority, however, for their argument that it was a due process violation for the New Jersey Supreme Court to set the policy for the employees of the judiciary. As discussed, conclusory assertions, such as those advanced here by the Plaintiffs, are not afforded any presumption of truthfulness sufficient to survive a Rule 12(b)(6) motion. See Papasan, 478 U.S. at 286; Haase, 807 F.2d at 215; Briscoe, 663 F.2d at 723; Western Mining Council, 643 F.2d at 626; Bermingham, 820 F.Supp. at 846.

— interests in a labor dispute.

Norris-LaGuardia Act, 29 U.S.C. § 104.

As counsel for the Defendants argues: "Plaintiffs offer no explanation as to how [the New Jersey] Supreme Court's policy, which is not issued in its judicial capacity, could possibly violate the Norris-LaGuardia Act." Defendants Brief at 32. According to the Plaintiffs, "assuming arguendo that the [D]efendants are correct, ... it is the policy considerations of the Norris-LaGuardia Act which are significant." Kirchgessner Reply Brief at 9.

It appears the Plaintiffs are arguing that even though the instant action neither implicates their right to representation by a union nor their right to collectively bargain, a right for them to join a law enforcement organization should be recognized as within the "policy" of the Norris-LaGuardia Act. The Plaintiffs are unable to point to any authority to support such assertion.

It appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of a violation of the New Jersey Supreme Court as set forth in the Kirchgessner Complaint. Hartford Fire, 113 S.Ct. at 2917; Hishon, 467 U.S. at 73; Conley, 355 U.S. at 45-46; Piecknick, 36 F.3d at 1255; ALA, 29 F.3d at 859; Jordan, 20 F.3d at 1261; Unger, 928 F.2d at 1395; Markowitz, 906 F.2d at 103; Ransom, 848 F.2d at 401; Angelastro, 764 F.2d at 944. Therefore, the motion to dismiss the Plaintiffs' claim under the Norris-LaGuardia Act, as alleged in count four of the Kirchgessner Complaint, is granted pursuant to Rule 12(b)(6).

3. 42 U.S.C. § 1983

Count three of the Kirchgessner Complaint and count two of the PANJ Complaint allege the Chief Justice and the Associate Justices acted under color of state law to deprive the Plaintiffs their rights guaranteed under the Constitution in violation of section 1983 of title 42 of the United States Code.

Kirchgessner Complaint, ¶¶ 45-46; PANJ Complaint, ¶¶ 48-49. Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

"In order to prevail in a [section] 1983 action, a plaintiff must establish (1) that 'the conduct complained of was committed by a person acting under color of state law; and (2) that the 'conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.'" Shaw v. Strackhouse, 920 F.2d 1135, 1141-42 (3d Cir. 1990)(quoting Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986)).

In light of the foregoing discussion, the Plaintiffs are unable to establish the second requirement for the maintenance of a claim under section 1983. It appears, therefore, beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations of section 1983 violations as set forth in the Kirchgessner Complaint and the PANJ Complaint. Hartford Fire, 113 S.Ct. at 2917; Hishon, 467 U.S. at 73; Conley, 355 U.S. at 45-46; Piecknick, 36 F.3d at 1255; ALA, 29 F.3d at 859; Jordan, 20 F.ed at 1261; Unger, 928 F.2d at 1395; Markowitz, 906 F.2d at 103; Ransom, 848 F.2d at 401; Angelastro, 764 F.2d at 944. Accordingly, the motion to dismiss the Plaintiffs; claims under section 1983 of title 42, as alleged in count three of the Kirchgessner Complaint and count

two of the PANJ Complaint, is granted pursuant to Rule 12(b)(6).

E. State Law Claims

As discussed, in addition to the Federal Claims, the Plaintiffs allege the Chief Justice and the Associate Justices have violated their rights under New Jersey state law (the "State Law Claims").

Count five of the Kirchgessner Complaint and count three of the PNAJ Complaint allege a deprivation of rights as provided by the New Jersey State Constitution, Art. 1, ¶ 19. Plaintiffs allege that the prohibition on affiliation with the State PBA and the FOP is a deprivation of the Plaintiffs' right to organize through representatives of their own choosing as public employees. Kirchgessner Complaint, ¶¶ 48-49; PANJ Complaint, ¶¶ 50-52. Additionally, count six of the Kirchgessner Complaint and court four of the PANJ Complaint allege forbidding membership in the State PBA and the FOP deprived the Plaintiffs of the right to join and assist any employee organization, as guaranteed by N.J.S.A. § 34:13A-5.3 Kirchgessner Complaint, ¶¶ 50-52; PANJ Complaint, ¶¶ 52-53.

Supplemental jurisdiction enables Federal courts to hear state law claims over which there is no independent basis of jurisdiction. 28 U.S.C. § 1367; Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1374 (3d Cir. 1994). Supplemental jurisdiction depends upon the existence of subject matter jurisdiction over other Federal claims in the action. Section 1367(c) permits a court to decline supplemental jurisdiction when "the district court has dismissed all claims over which it haw original jurisdiction." 28 U.S.C. § 1367(c)(3); see also, Carnegie-Mellon, 484 U.S. at 350 (when the Federal-law claims have dropped out of the lawsuit and only state-law claims remain, the Federal court should decline the exercise of jurisdiction by dismissing the case without prejudice).

In the instant case, the Plaintiffs base Federal jurisdiction upon 42 U.S.C. §1983, 28 U.S.C. § 1343 and 29 U.S.C. § 102. Kirchgessner Complaint, ¶¶ 2-3; PANJ Complaint, ¶ 4. Because dismissal pursuant to Rule 12(b)(6) is granted as to the Federal Claims, such claims can no longer support supplemental jurisdiction in this court. 28 U.S.C. § 1367(a), (c).

In the instant action, there appears to be no independent basis for jurisdiction over the State Law Claims. It appear the Plaintiffs reside in New Jersey. Kirchgessner Complaint, ¶ 6; PANJ Complaint, ¶¶ 9-14. The Chief Justice and the Associate Justices are sued in their official capacity, and are all alleged to maintain chambers in the state of New Jersey. Kirchgessner Complaint, ¶¶ 7-13; PANJ Complaint, ¶¶ 15-21. In fact, it appears all are residents of New Jersey. Plaintiffs do not allege diversity jurisdiction; it appears they have no basis for such an allegation. Because no other ground for supplemental jurisdiction is alleged, nor does any appear appropriate, supplemental jurisdiction will not be exercised in the instant case. Carnegie-Mellon, 484 U.S. at 350 n.7 (citing Gibbs, 383 U.S. at 725); Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1535 (3d Cir. 1992); Fuentes v. South Hills Cardiology, 946 F.2d 196, 198 n.3 (3d Cir. 19910; 28 U.S.C. § 1367 (c)(3). Accordingly, the State Law Claims alleged in counts five and six of the Kirchgessner Complaint and in counts three and four of the PANJ Complaint are dismissed without prejudice.

F. Preliminary Injunction

The Circuit has established, that the decision to issue a preliminary injunction is based upon a review of four factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994); see also S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992); Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., 963 F.2d 628, 632 (3d Cir. 1992); Opticians Ass'n of Am. v. Independent Opticians of Am., 920 F.2d 187, 191-92 (3d Cir. 1990; Alessi v. Pennsylvania, Dept. of Pub. Welfare, 893 F.2d 1444, 1447 (3d Cir. 1990); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989); Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1116 (3d Cir. 1989); Apollo Technologies v. Centrosphere Indus., 805 F.Supp. 1157, 1191 (D.N.J. 1992); Glenside West Corp. v. Exxon Co., U.S.A., 761 F.Supp. 1118, 1132 (D.N.J. 199) CPC Int'l, Inc. v. Caribe Food Distribs., 731 F.Supp. 660, 664 (D.N.J. 1990); Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F.Supp. 616, 624 (D.N.J. 1989).

Of these four requirements, the Circuit has placed particular weight on the probability of irreparable harm and the likelihood of success on the merits, stating: "'[W]e cannot sustain a preliminary injunction ordered by the district court where either or both of these prerequisites are absent.'" Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197 (3d Cir. 1990)(quoting In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143)3d Cir. 1982)); see also Instant Air, 882 F.2d at 800; Morton v. Beyer, 822 F.2d 364, 367 (3d Cir. 1987); Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148, 151 (3d Cir. 1984).

Significantly, the Circuit has repeatedly stated that a "grant of injunctive relief is an extraordinary remedy which should be granted only in limited circumstances." Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988); accord Chez Sez III Corp. v. Union, 945 F.2d 628, 634 (3d Cir. 1991), cert. denied, 503 U.S. 907 (1992); Instant Air, 882 F.2d at 800; United State v. Philadelphia, 644 F.2d 187, 191 n.1 (3d Cir. 1980); see also Driscoll Potatoes, Inc. v. N.A. Produce Co., 765 F. Supp. 174, 176 (D.N.J. 1991).

In light of the dismissal of all counts of the Kirchgessner Complaint and all counts of the PANJ Complaint, the motion

to Plaintiffs for a preliminary injunction is denied as moot.

G. Class Certification for the Kirchgessner Plaintiffs

Rule 23(c)(1) of the Federal Rules of Civil Procedure ("Rule 23") provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed.R.Civ.P. 23(c)(1). As the Fifth Circuit in Floyd v. Bowen, 833 F.2d 529, 534 (5th Cir. 1987) explained:

> The timing requirements of Rule 23 are not absolute. Professor Wright explains that "[t]he court always is empowered to make a determination on the merits irrespective of the denomination of the suit as a class action ... the propriety of that inquiry is limited only by concerns of whether the class determination should be postponed until after the merits determination." C. Wright, A. Miller, and M. Cane, 7 Federal Practice & Procedure, 1785 at 128 (footnote omitted) (1986). Indeed ... the class action litigation may be halted by a ... motion to dismiss or by a ... motion for summary judgment.

Id. (citations omitted); see also Marx v. Centran Corp, 747 F.2d 1536, 1552 (6th Cir. 1984)("It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action."), cert. denied, 471 U.S. 1125 (1985); Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984)(holding that district court has discretion, under appropriate circumstances, to rule on summary judgment motion before addressing pending class certification motion).

In Finberg v. Sullivan, 634 F.2d 50, 64 (3d Cir. 1980), the Third Circuit held, however, that the determination of the merits of a plaintiff's claims was not a valid basis to deny a motion for class certification. The Circuit explained: "In

general, the certification of a class does not depend upon whether the substantive claims have any merit." Id. (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970)).

In Finberg, the plaintiff had filed a timely motion for class certification, upon which the district court took no action for nine months prior to defendants' motion for summary judgment. 634 F.2d at 64. The district court finally found the plaintiff's claims lacked merit and, therefore, reasoned that there was no purpose for class certification. Id. Under these circumstances, and where there was a risk that the claim of the named plaintiff would become moot, the Third Circuit held "the district court's rulings on the plaintiff's substantive claims did not constitute a valid basis for denial of class certification." Id.

The instant action is distinguishable from Finberg. The Kirchgessner Complaint includes a demand for class certification, Kirchgessner Complaint, ¶¶ 23-28 and at 12; however, there is no pending motion for class certification. Moreover, neither party has briefed the propriety of such class certification.

As the court in Marx explained, the Supreme Court's decision in Eisen

> stand[s] for the proposition that when a district court is determining whether a class action may properly be maintained under [Rule 23}, the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action.]Eisen] ... do[es] not establish a broad rule that in all cases the determination of the propriety of a class action must precede any consideration of the merits.

747 F.2d at 1552.

Under the circumstances of the instant action, where

class certification was neither raised by the parties in a prior motion nor brief in the instant motion for preliminary injunction or in the cross-motion for dismissal, it is appropriate to determine the merit of the cross-motion for dismissal without determining the class certification demand. In light of the propriety of the cross-motion by the Chief Justice and the Associate Justices for dismissal pursuant to Rule 129b)(6) and the dismissal of all counts of the Kirchgessner Complaint and the PANJ Complaint, it appears unnecessary to address the class certification issue. See Marx, 747 F.2d at 1552 ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake."). Accordingly, the Kirchgessner Plaintiffs demand for class certification is denied as moot.

Conclusion

For the reasons set forth above, the cross-motion by the Chief Justice and the Associate Justices to dismiss the Federal Claims, alleged in counts one through four of the Kirchgessner Complaint and counts one and two of the PANJ Complaint is granted; supplemental jurisdiction will not be exercised as to the State Law Claims, alleged in counts five and six of the Kirchgessner Complaint and in counts three and four of the PANJ Complaint. The Motion by Plaintiffs for a preliminary injunction is denied as moot; the Kirchgessner Plaintiffs demand for class certification is denied as moot. An order accompanies this opinion.

(s)
ALFRED J. LECHNER, JR., U.S.D.J.

AJL: jss
cc: John G. Basilone, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Robert Kirchgessner, Jr., et al.	
Plaintiffs,	CIVIL ACTION NO. 94-5973 (AJL)
v.	
	ORDER
Robert N. Wilentz, et al.	

This matter having come before the court by way of the motion of the plaintiffs (the "Plaintiffs") for a preliminary injunction (the "Preliminary Injunction Motion") and by the cross-motion of defendants (the "Defendants") for dismissal pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Motion to Dismiss"), and the court having considered the submissions of the parties, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 28th day of April, 1995,

ORDERED, that the Motion to Dismiss made by the Defendants is granted as to the Plaintiffs' causes of action based upon Federal law; and it is further

ORDERED, that supplemental jurisdiction will not be exercised as to the Plaintiffs' causes of action based upon state law; and it is further

ORDERED, that the causes of action based upon Federal law alleged by the Plaintiffs be and hereby are dismissed with prejudice; and it is further

ORDERED, that the causes of action based upon state law alleged by the Plaintiffs be and hereby are dismissed

without prejudice; and it is further

ORDERED that the Preliminary Injunction Motion made by the Plaintiffs be and hereby is denied as moot; and it is further

ORDERED, that the Plaintiffs' demand for class certification be and hereby is denied as moot

ALFRED J. LECHNER, JR., U.S.D.J.

PRINTER'S NOTE:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5328; No. 95-5329

ROBERT A. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Appellants,

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICE OF THE SUPREME COURT OF NEW JERSEY,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 94-05973, 94-06375)
District Judge: Hon. Alfred J. Lechner, Jr.

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS AND MCKEE, Circuit Judges

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The petition for rehearing filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(s)_____
Circuit Judge

DATED: Aug. 21, 1996

jm/cc: AJF
RHS

SUPREME COURT OF NEW JERSEY
E-57 September Term 1993

IN THE MATTER OF PROCEEDINGS CONCERNING PROBATION OFFICERS' MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS AND PROPOSED AFFILIATION OF PANJ WITH THE NEW JERSEY STATE POLICEMEN'S BENEVOLENT ASSOCIATION, INC.

Hearings held March 16, 17, 18, 19, 21, 1994
Report of Special Master Issued March 28, 1994
Submitted to the Court April 28, 1994
Administrative Ruling Issued July 8, 1994

David I. Fox and Craig S. Gumpel for petition Probation Association of New Jersey (Fox and Fox, attorneys).

Paul I. Kleinbaum and Robert A. Fagella for petitioner New Jersey State Policemen's Benevolent Association, Inc. (Zazzali, Zazzali, Fagella & Nowak, attorneys)

George Tosi for petitioner Fraternal Order of Police.

Jude Del Preore, President, Chief Probation Officers' Association, petitioner pro se

Assistant Attorney General Robert H. Stoloff and Deputy Attorney General Michael L. Diller for respondent Judiciary of New Jersey (Deborah T. Poritz, Attorney General of New Jersey, attorney).

PER CURIAM

The Court has been asked to review its long-standing policy prohibiting probation officers from becoming members of law enforcement organizations along with the related issue of the propriety of the proposed affiliation of the Probation Association of New Jersey (PANJ) wit the Policemen's Benevolent Association of the State of New Jersey (PBA). The parties directly interested in the issue are the Fraternal Order

of Police (FOP), PBA, PANJ, and the Chief Probation Officers Association. We decided that to aid us in our administrative disposition of the matter, we should appoint a Special Master to develop a record and make recommended findings of fact. Judge Paul Huot (Retired) kindly agreed to serve in that capacity. His service has been invaluable in this matter. The Probation Division of the Administrative Office of the Courts participated in the proceedings, basically in opposition to all other parties.

Our determination is grounded in long-standing policy considerations that have governed the exercise of our exclusive power over the administration of the courts. In this case that power involves the Probation Division, an integral part of the court system. Our determination is quasi-legislative, based on the policy considerations noted below, conforming essentially to policies adopted by this Court in 1976, and on our own knowledge of the subject matter. These policy considerations, this knowledge, and our decision are all derived from our responsibility for, our authority over, our involvement with and our regular and continuing regulation and oversight of the Probation Division and its functions and operations. In arriving at our administrative determination, we have been very much aided by the testimony before the Special master and by his report.

A. The Court's administrative determination

As a comparison of our determination and the Special Master's report indicates, we have not adopted all of his factual recommendations. Although we treat that subject explicitly at various points in our determination, we note here that our disagreement is not fact-specific, for as he notes the evidence was largely insufficient, given the time constraints of the hearing, to reach any such determinations (or as the Special master noted concerning the central question before us, the evidence was "not such that a true factual determination can be made"). Concerning the matters submitted to him and his report on those matters, our differences, as we view them, are based on a different assessment of risks, are based on the

importance of our plans for probation, and most of all are based on our responsibility to protect the probation function from those risks now and in the future. But our decision today is more fundamental, rooted in the nature of judicial integrity and its essential quality of impartiality.

Our decision rests on the fundamental difference between probation and police organizations. Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more that a court may, and cannot be perceived as taking sides any more that a court may. It is not pro-this or anti-that, it is not on the side of either men and fathers or women and mothers, it is not on the side of either parents or children, not on the side of either prosecutors or defendants. It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.

Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice -- the prosecution's side.

Put simply, the functions of police and probation -- one serving the prosecution the other serving the courts -- are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary.

The Court has therefore decided to maintain its policy prohibiting probation officers from becoming members of law enforcement organizations, in particular the FOP and the PBA. A directive to that effect will be issued, including a requirement

that existing memberships in the FOP may not be renewed and in any event must be terminated by resignation or otherwise by January 1, 1995. We also prohibit affiliation of PANJ with the PBA.

B. Statement of basic probation policies

The opposing contentions of the parties and our discussion of them require at the outset a clear statement of the Court's position on certain basic policies so that there be no misunderstanding about them:

1) probation officers must enforce court orders including conditions of probation; no junction of probation is more important. While enforcement is subject to the admitted existence of some degree of discretion, the overall quality of enforcement must result in court orders that are consistently respected and obeyed. Lack of resources is unfortunately a reality that affects the level of enforcement; no other factor constitutes justification for a level of enforcement below that standard.

2) Cooperation between probation officers and police is essential in achieving the maximum effectiveness of probation. That cooperation exists today, and the Court strongly encourages it.

3) The probation function, especially in certain aspects of supervision and collection, has become increasingly dangerous. The Court supports measures to ensure the safety of probation officers.

4) The need to punish those convicted of crime has never been more important. One of the functions of probation and supervision of probation is punitive; it is a function that cannot

be compromised. The Court will continue to direct probation to achieve that function for all probationers.

5) The need for greater emphasis on intensive supervision and rehabilitation as part of the probation function is becoming increasingly apparent. Guided by specific legislative appropriations, the Court has supported action in that direction, will continue to do so, and anticipates a substantial acceleration of that trend in the future.

The Court's determination today is consistent with the foregoing policies. None of those policies requires either an alliance between probation and police or membership of probation officers in police organizations. All of those policies require preservation of judicial impartiality in the probation function.

In the specific context of the issues submitted to the Special Master and his report, we note that the rehabilitation goal of probation, properly understood and administered, is not inconsistent with its punitive goal. Probation officers must pursue both goals; the punitive component without exception, and the rehabilitative effort measured by its potential achievement in the particular case. Probation officers need not act like police nor be identified as police in order to achieve the punitive goal; and if they do so act or are so identified, they will be significantly less able to achieve the rehabilitation goal.

C. The administrative proceedings and the Special Master's report.

The foregoing constitutes the underlying basis for our decision. The issues submitted to the Special Master, issues raised by the parties' request that we reconsider our policy, deal with specific aspects of probation not directly addressed above. While those issues are ultimately related to and impinge on the judicial nature of probation and its essential impartiality, they

touch on other matters as well. Involved is the present and future mission of probation, our plans for strengthening probation's effectiveness, and, in that context, a more detailed treatment of the impact of an alliance between probation and police. In the proceedings before the Special Master, PANJ and the police organizations, in addition to their implicit challenge to our statement of the essentially judicial nature of probation, question whether changing the present policy would have any adverse effect. They also claim that the policy is irrelevant both to the present and future mission of probation and to plans for strengthening probation. Since our response to those challenges and claims plays an important part in our decision, reinforcing the decision's fundamental basis as set forth above, we address this aspect in detail below. We note that whatever the specific context or aspect of the various disputes, the necessity of preserving the impartiality of probation officers and the probation function is central to the resolution of those disputes.

(1) Summary of AOC testimony

We note at the outset testimony of Harvey Goldstein, because its import is a recurring theme in these proceedings and in our decision. Mr. Goldstein, the Assistant Director of the Probation Division of the Administrative Office of the Courts, has had twenty-five years experience in various aspects of probation, holds a Master's Degree in Criminal Justice, and is the former President of the American Probation and Parole Association. He is, and has been for the past eleven years, the official charged with primary responsibility for the probation function in this State. While he dealt with many aspects of probation as it affects this case, his statement of the role of probation -- as consisting of both punishment and rehabilitation components -- was the basis for his central conclusion; the critical need of probation today is to establish and maintain an appropriate balance between those two components, a balance seriously threatened by membership in and affiliation with police organizations. Mr. Goldstein pointed out various consequences of such membership and affiliation: the identity of probation officers as police in the mind of the probationer

and the public; the identity of the probation function itself as police work; the impact of those identifications on the willingness of community groups to become involved in rehabilitative efforts, and its impact on the probationer's cooperation with those efforts; the influence of membership and affiliation on the conduct of probation officers, substantial and inevitable influence as he viewed it, although subtle and as a practical matter, largely undetectable and unprovable given the nature of probation work and the broad discretion vested in probation officers; the impact in fact and appearance on probation officers' impartiality in performing numerous functions that influence important decisions in criminal cases: bail, pretrial intervention, sentencing, and revocation of probation itself; and its impact on those probation officers holding important positions in the court system, in particular performing case management functions in the Criminal Division and the Family Division, including holding positions such as team leaders and assistant division managers. Mr. Goldstein implied that even today the balance is not appropriate: that because of the shortage of resources, probation officers are hard pressed to perform their punitive role effectively, and the goal of rehabilitation is often theoretical. His view of the future of probation provides content to the concept of an appropriate balance: he noted the success, including its impact of recidivism, of the Intensive Supervision Program (ISP), and the implementation of the Juvenile Intensive Supervision Program (JISP) -- both programs relatively new, each including not only carefully supervised conditions of probation but also substantially expanded efforts at rehabilitation -- and he pointed to intermediate sanctions, a probation model often described as somewhere between prison and conventional probation, proven to some extent in pilot projects in various counties, as the promise of the future, with its punitive component accompanied by deep community involvement in rehabilitative efforts to reintegrate probationers into the community. He noted through all of this the need for a substantial increase in probation resources, especially in probation officers.

From Mr. Goldstein's testimony, a clear picture emerged, a picture of probation today, struggling to achieve its

goal, short of resources, the rehabilitative component seriously affected, the appropriate balance not achieved; and the future of probation, with all of its promise, its great potential, dependent on additional resources, dependent on restoring the balance by greatly strengthening both components. He stated his conclusions not as an academic theoretician but as a practical judgment from one experienced in probation that both its present and future effectiveness, and especially its great potential for rehabilitation, would be hurt by the proposed membership and affiliation of probation officers in and with police organizations. In his testimony Mr. Goldstein strongly supported the need of cooperation between probation and police, but carefully distinguished cooperation from identification, with all of its consequences, and its potential damage. He thought probation should seek to establish between probationer and probation officer a relationship of trust, not surveillance.

William D. Burrell, Gregory B. Wilcenski, and Raymond R. Rainville provided supportive testimony. Mr. Burrell, with twenty-two years experience in probation, also holds a Master's Degree in Criminal Justice and is the former President of the National Community Service Sanctioning Association. He is presently the Chief of Supervision Services in the Probation Services Division of the Administrative Office of the Courts. Mr. Wilcenski, Chief of Juvenile Probation Services, has twenty-four years experience in probation and a Master's Degree in Criminal Justice. Mr. Rainville has twenty-five years experience in probation, a Ph.D. from Fordham University, and is the former President of the National Child Support Enforcement Association.

(2) Consideration of the present function and the future function of probation

An underlying question implicit in the administrative proceedings before the Special Master is whether the Court's probation policies may consider not just today's realities but also tomorrow's plans. The Court concludes not only that

today's realities justify its determination, but that a different determination would substantially damage the ability to achieve future plans. We appreciate the strength and sincerity of the opposing views of some probation officers. In particular, we are sensitive to the safety concerns that partially underlie those views. The wish, apparently shared by a substantial number of probation officers, to become more closely allied and identified with police inevitably gives us pause, for we are reluctant to impose on such dedicated judiciary employees a restriction that they find not only in conflict with their own wishes, but also one they believe is unjustified by their own understanding of the probation function. But the dangers of the moment cannot determine the long-term policies of probation, even though they have a significant impact today on safety. The position of the probation officers, however, also reinforces our conclusion concerning the importance of our determination, for obviously we are not restricting some theoretically possible identification of probation officers with police: we are in fact resisting a most concrete and substantial attempt to bring those two forces -- police and probation -- closer to unification.

The organizations before us paint a picture of probation officers able today to perform only one function, and therefore realistically with only one objective -- enforcement of punishment -- but with insufficient resources even to accomplish that. Given that single objective, and given the history of underfunding that relegated rehabilitation to an almost=theoretical goal, they note that neither the public nor the probationer have a different view -- both see probation officers much the same as police. Indeed, the reality of today is a probation function so starved for resources that supervision in many cases cannot achieve punishment, cannot secure compliance with conditions of probation, and even more so cannot achieve rehabilitation. According to Mr. Goldstein, the number of probation officers in New Jersey should be doubled. Administrative Office of the Courts, State of New Jersey, A Model for Enhancing Probation Supervision: Purpose, Priorities, Practices (1992) at p. 47 and Tables 1 and 2. In response to the insufficient number of probation officers, that report (approved by the Supreme Court in November 1992)

suggests classifying cases according to the degree of risk, dedicating more supervision to high-risk cases and less supervision to low-risk cases. Id. at 53. Establishing a priority of cases and, when appropriate, relaxing supervision will allow overburdened probation officers to manage their caseloads. Id. at 9.

(2)(a) Moving toward the twin goals of punishment and rehabilitation

The Court agrees, along with Goldstein and other experts in the field, that the two goals -- punishment and rehabilitation -- must be balanced and that present knowledge, including experience in New Jersey, strongly points to substantially greater benefits t society when the rehabilitative component, long neglected, is addressed along with the punitive component. Our future plan is for a probation function with personnel sufficient not only to punish but to bring probationers back into the community as productive citizens in significantly larger numbers than now, to diminish recidivism, and, among other things, to reduce the need for construction of prisons. The ultimate issue -- whether probation officers should be even more strongly identified and associated with the police, in fact and in appearance, by allowing them to join police organizations and be part of a police union -- turns on those differing policy goals. Clearly the judicial necessity of impartiality does not permit such alliance. Furthermore, we hold firmly to the conclusion that close identification of probation officers with police is unnecessary to the achievement of the punitive function and is inconsistent with the rehabilitative goal of probation; that such close identification would constitute a serious obstacle to the cooperation of both the community and probationers, cooperation that is essential to rehabilitation, so important now and even more so in our plan for the future; that it would jeopardize those future plans; and, finally, that no scientific survey is required legally to support these essentially predictive conclusions, but rather that the practical and policy judgment is ours to make, a judgment fully supported on this record by the testimony of experts and by our own experience and common sense.

The questions raised by counsel suggest that the public wants enforcement and punishment, rather than rehabilitation. This is only part of the picture. What the public wants is an end to crime, an end to recidivism, and perhaps an end to the endless construction of new prison. If, as we believe, the more likely path to these ends, a path supported by the Legislature, is an appropriate balance between the punitive and rehabilitative functions of probation, we owe it to the public to reset that balance; and if we believe that achieving that balance is less likely if we turn probation officers into police, we owe it to the public not to allow that to happen.

The considerations that were the basis for this long-standing policy concerning membership in law enforcement organizations are even stronger today than before. Although they may not have been clearly spelled out at the time, those policy considerations appear to have had the same basis as today's decision: the need, both in fact and in appearance, of total impartiality on the part of probation officers as an arm of the judiciary, especially in matters related to law enforcement. Probation officers are on the side of impartial justice, as is the entire judiciary, and may not act or be perceived to act in favor of any other interest.

The future course for probation, although not yet fully implemented, required impartial enforcement of more court orders that will have a significant rehabilitative component. The Court has intensely studied the probation function over the past thirteen years. We have formed commissions, task forces, and study groups, and held conferences in that effort. The most noteworthy conclusion, among many, of those studies is that probation's role is not only the punishment of offenders but also the rehabilitation of offenders and their ultimate reintegration into the community.

(2)(b) Recent developments in probation; future plans for probation; ISP; JISP, and intermediate sanctions

One model of that role is the Intensive Supervision Program, presently in place for adult offenders (ISP) and in the process of implementation for juveniles (Juvenile Intensive Supervision Program or JISP), both supported by specific legislative appropriations. Probationers under ISP, as the name implies, are carefully and intensively supervised pursuant to court order to assure compliance with conditions usually much more severe than those applicable to ordinary probationers, who often get at most a phone call or a rare visit. Its punitive component is substantial, sometimes in fact the functional equivalent of the incarceration terminated by ISP. ISP's rehabilitative component, however, also pursuant to court order, far exceeds that of ordinary probation. It commences with assessments of plans proposed by probationers, families, and friends, including community support groups. The goal of the plan is the probationer's recovery, reformation, employment, rehabilitation, and reentry into the community. The program works through training, discipline, employment-seeking, organizing community groups, getting employers interested in the program, referral to appropriate service agencies for drug and alcohol treatment if necessary, and anything else that is conducive to rehabilitation. It has been enormously successful, as documented not only by dramatically lessened rates of recidivism, but by careful independent evaluations as well. See Frank S. Pearson, Institute for Criminological Research, Rutgers University, Final Report - Research on New Jersey's Intensive Supervision Program (1987), and Frank S. Pearson, Institute for Criminological Research, Rutgers University, Deterring Drug Use with Intensive Supervision (1991).

The key to ISP's success are the highly-trained, highly-dedicated probation officers directly charged with the responsibility for all aspects of ISP, both rehabilitation and punishment. Their role, simply put, is to pull these many elements together and make them work. They are the right arm of the rehabilitation component. They are not just the probationer's keeper, but also the probationer;s supporter, counselor, a link between the probationer's past and his or her hope for a future, and sometimes even a role model. They are firmly committed to the probationer's rehabilitation under court

order, with the help of family, friends, and community, all in the effort to achieve a normal productive life.

The role of these probation officers would be impossible if they were perceived in any way as "law enforcers," as "police," or if they acted as such. Neither the community groups, the family, nor the probationer would accept, work with, or be inspired by someone thought to have punishment as the main goal. The same concerns apply to JISP. Although our experience with that program is more limited, we believe these concerns as applied to JISP are just as strong, perhaps even stronger, given the heightened sensitivity and vulnerability of juveniles, and their suspicion of authority figures.

Our support of ISP and JISP, as well as intermediate sanctions, a modified version of ISP discussed below, is not based on some penological policy independently adopted by this Court. ISP and JISP, with both punitive and rehabilitative components, were approved by the Legislature before either program was implemented by the judiciary, ISP in 1983 and JISP in 1992. That the Legislature has supported them is an understatement: in effect the Legislature has mandated them. While these programs were initiated by the Judiciary, the fact is that before implementation of either, line item appropriations were passed by the Legislature, the appropriations confined exclusively to the funding of ISP and JISP. Such appropriations are intended by the Legislature as both support for a program and a direction that it be implemented, and are ordinarily so regarded by the judiciary. This legislative support and direction have been remarkably strong: during a period of sever fiscal constraint and shrinking budgets, funding of the ISP line item has held firm and the JISP line item, funding a new program, was started, a most unusual occurrence during years when funding of existing programs was often diminished or even eliminated. The penological policy, therefore, implicit in ISP and JISP is very much legislative, fully concurred in by the judiciary.

Even more that ISP, the future of probation is in the area of intermediate sanctions, a modified form of ISP.

Intermediate sanctions consist of court orders providing for supervision less intrusive than ISP, for rehabilitation more extensive, and with integration into the community as its touchstone. Assuming legislative concurrence and support, this is what we see as the future of probation, applied to probationers in far greater numbers than the legislatively approved ISP or JISP. In intermediate sanctions programs, probation officers are part of a community program, organized by community activists, court personnel, treatment providers, potential employers, interested citizens, public officials -- a plan of rehabilitation and integration into the defined community (a section, a block, a group) in all of its elements, but still with a defined collection of individuals directly responsible for the probationers. Unlike ISP, this program does not require prior incarceration, for neither jail nor prison is necessarily appropriate for these less-than-serious offenders although without the availability of intermediate sanctions as a sentencing option, jail or prison is in fact often the sentence. The potential impact of intermediate sanctions on the prison and jail population could be substantial. Critical to this effort are the probation officers, responsible for assuring that intermediate sanctions are working, that not only are the conditions of probation, i.e., punishment, met, but also that the at-least-equal goals of rehabilitation and integration into the community are realized.

Intermediate sanctions (and its result in reducing recidivism) is the hope of the future for probation. But it is more than mere hope. We have in fact tried it in New Jersey -- in Newark and in New Brunswick (and to a lesser extent at the county level in Bergen, Camden, Morris, Essex, and Union Counties), and it appears to work, although the experience so far has not been extensive. The concept has enormous promise, both for those probationers who will benefit and for society. The incompatibility of a probation officer's role in this program with the identification of that probation officer as a police officer is glaring: trust, confidence, and hope -- not punishment -- are the essential ingredients for the cooperation of all involved in intermediate sanctions and for the program's success. An intermediate sanctions program will not even get

off the ground without the initiative of an impartial probation officer, without the ultimate responsibility of a trusted probation officer. The necessary individuals and institutions in the community will not participate if they believe the probation officer is more interested in discovering and punishing a violation of probation than in encouraging a potential for rehabilitation.

The inability to obtain community support for a probationer under a court order designed to integrate him or her into society cannot be supported by statistical analysis, but the anecdotal evidence is persuasive. Mr. Goldstein noted one conversation, the theme of which was common to many conversations he had throughout the state, when community activists told him that they would never attempt to become involved in such a program if probation officers remained "mini cops," that "if all you want us to be is min-cops who are going to be watching what your clients are doing and reporting them so that you can have them re-arrested and sent back to court for other kinds of handling, we don't want to get involved."

The likely future of probation, described above and proven by present experience, thus provides added support for our position. The allowance of membership in police organizations moves us in the wrong direction nd threatens the success of probation. But for the obvious fiscal constraints, our proposed budget would have included the very substantial expansion of probation needed to implement our plans further. The organizations before us in effect dismiss these plans ar unrealistic, given present fiscal constraints. Our determination of the question before us is not the appropriate place for budgetary analysis, but obviously, if successful, the cost of such programs in the long run may be justified by savings far exceeding costs.

This emphasis on rehabilitative programs underlines the necessity that probation officers must both in fact and in appearance be totally impartial -- especially given our overall view, significantly supported by the Legislature, that probation's future is grounded in ISP, JISP, and intermediate sanctions.

The integration, involvement, and identification of probation officers as police is inconsistent with that future. It would do damage even as it affects probation today, damage to the role of probation today and to programs that are already in place. But its potential harm for the future is much greater, since probation's future itself is much greater. We will not risk that future implementation with any such entanglement of probation with the police.

The importance and timeliness of our plans for the future are underlined by the advent of State funding. Probation, like the rest of the judiciary, has been afflicted both in its funding and management by the existence of twenty-one counties disparately supporting judicial functions, including especially the probation function. The result has been a variety of practices, procedures and policies making a coherent State policy difficult to achieve. It is now possible, as a result of State funding, to implement the studies that we have made, to implement the legislative policy, a policy that we believe in, and, more than possible, it is something for which we can and should be held accountable. The greater likelihood of funding adequate to implement that policy statewide must not be jeopardized by actions that impair our ability to do so, actions that will properly be recognized as such.

Extracts from the following reports indicate the judiciary's commitment to both the punitive and rehabilitative functions of probation, the increasing importance of the rehabilitative goal (within the context of a recognition of its primary duty to enforce court orders) and the consequent increased stress on community involvement, along with the emergence of intermediate sanctions and its importance.

Final Report (approved by Supreme Court April 1993), 1992 Judicial Conference on Sanctioning and Probation (pp. 1, 2, 7, 8, 13-16)

1992 Judicial Conference on Sanctioning and Probation (Report of the Committee on Probation Management (pp. 15, 30-31(; (Report

of Committee on Community Supervision (pp. 1, 3, 4, 10))

Final Report (approved by Supreme Court November 1991); 1990 Judicial Conference on Drugs and the Courts (pp. 40, 41, 45)

Final Report (approved by Supreme Court October 1990), 1989 Judicial Conference on Juveniles, Justice and the Courts (p. 39)

1989 Judicial Conference on Juveniles, Justice and the Courts (Report of the Committee on Community-Based Treatment and Services (pp. 48-52)).

Extracts from the Final Report of the New Jersey Sentencing Policy Study Commission appointed by the Governor (1994) (pp. 2, 12, 75, 76) point in the same direction.

(3) The increased need for impartiality: role conflict problems

Other factors, not present when our policy prohibiting membership in law enforcement organizations was first pronounced, are strongly supportive today. The vast majority of case management personnel in the Criminal Division and the Family Division of Superior Court are probation officers, including some assistant division managers and team leaders. The fact is that probation officers provide a rich pool of talented public servants uniquely qualified for that type of work. Given the absolute mandate of impartiality in those positions, and given that they are court officers performing important functions in which the police and law enforcement in general have a substantial interest and, indeed, have adversarial position, their identification as members of a police organization would be unthinkable. That it is theoretically possible to single out those probation officers from other probation officers and extend the prohibition only to them is no solution. Not only

does that understate the importance of the prohibition as generally applied to all probation officers, but it would restrict the judiciary's ability to assign and reassign personnel from probation functions (or collection functions) to case management functions and back. The identification of case management professionals as former members of a police organization will not disappear so quickly, nor will their general identification as part of law enforcement, if probation officers generally are perceived as police, as part of the PBA or FOP.

(4) The potential consequences of PANJ affiliation with the PBA

The affiliation of PANJ with the PBA would compromise probations' impartiality and would be inconsistent with our basic conclusion that the probation and police functions are fundamentally incompatible. The stipulated result of the proposed affiliation would be membership of probation officers in the PBA. Furthermore, other potential consequences of this affiliation threaten the impartiality and integrity of the probation function. We cannot say from the record before us, and we simply do not know, if the PBA would insist that probation officer members adhere to the relationship with the PBA that is clearly contemplated by its constitution and be required to satisfy all PBA membership obligations. In the absence of any evidence to the contrary, we assume the PBA will so insist; the next two paragraphs are based on that assumption.

In addition to automatic membership in the PBA, all probation officers who are members of PANJ (and perhaps those who, though not members, are in units represented by PANJ) will be "subject to the jurisdiction" of the PBA. Their organization becomes a "local of the PBA." Like all such locals, they will have the right to endorse political candidates, take positions on political and legislative issues, and will be obliged to maintain public relations with local legislators. Each such probation officer will have a PBA car shield issued to him or her, along with "safety cards," which we assume identify the holder as associated with the PBA for whatever advantage that

may bring. Although the PBA will not act as PANJ's exclusive negotiating representative, it is available for such advice and consultation and guidance in that area as PANJ may desire. Counsel stated that although the PBA does not routinely sit at the bargaining table, it would if asked.

Every such probation officer will be required to complete a police training course (PTC) and certification. Our understanding is that the PTC require nine continuous weeks, five days a week, of training designed to improve the skills of police officers, to make them better police officers, including inculcation of respect for law enforcement values and the interest of law enforcement personnel -- police. Putting aside the very substantial problem of the loss of services of these probation officers by the judiciary, their potential transformation from probation officers into police officers is obvious. As the Special Master noted, one of the consequences of affiliation is that PANJ will lose its autonomy, and to that we add so may the probation officers.

> Each probation officer will be subject to the control and regulations of the State PBA. Probation officers may be placed in the position of supporting or opposing political candidates or legislation which may or not be in the best interest of probation officers. Probation officers may be placed in the conflict position where the state organization offers a monetary reward in connection with the arrest and conviction of a defendant convicted of assaulting or killing a PBA member.
>
> [Special Master's report at 10.]

We cannot say from this record precisely what the effects are of PANJ and probation officers being "subject to the jurisdiction of the PBA." What is apparent, however, is that the affiliation, the membership of probation officers in PBA, and the relationship that results, contemplate an entanglement of probation officers with police that may significantly affect and

transform them and the probation function. They will have become committed to the goals of the PBA, to the interests of police; they will be subjected, we assume, on specific issues to newsletters and the like, and to other efforts to subscribe to the position of the PBA, and to work in support of it. They will presumably attend PBA-sponsored meetings reinforcing that allegiance. To the extent any or all of the foregoing is generally known, their identification as the impartial employees of the judiciary will be overwhelmed by their identification as law enforcement officers allied with the police, and in fact the distinct risk exists that they will become such.

Probation officers, thus identified as, and identifying with, police would continue to investigate for and prepare pre-sentence investigations, a critical factor in judges' sentences; bail reports, important in determining the terms of bail, including the amount; pretrial intervention investigative reports, often determinative of admission to or rejection from that program; and probation violation reports that may lead to imprisonment of the probationer. All of these reports may depend significantly on police information. A probation officer who identifies with the police may be less able to critically evaluate that information. The damage to the judiciary of the appearance of police bias is obvious and profound as is the damage to the defendant from the possible police bias in fact -- conscious or subconscious. In addition, probation officers continue to act as court-support personnel, including team leaders and assistant division managers, in both the Criminal and Family Divisions of the Superior Court where their services affect law-enforcement-related matters in many other important ways.

We need not look into the future of probation that we are trying to establish, but can simply view probation as is exists today to grasp the incompatibility of these consequences with probation's function. This is no "social and fraternal" relationship[, such as that found to have been established by membership in FOP. The PBA is an organization actively supporting the interest of police in every legitimate way possible, politically, legislatively, and through the support of its

members, an organization that expects its locals -- to which it would add PANJ and all of the probation officers within PANJ -- to follow its lead.

We therefore prohibit the proposed affiliation.

(5) The Court's position and the Special Master's report; probation's affiliation with an membership in the PBA

The Special Master's report and recommendations are based on his view of probation as it now exists. If probation's lack of resources and its consequent inability to fulfill its role is assumed to b e permanent condition, our disagreement with the Special Master would be less pronounced. We do not accept today's significant identification of probation officers with law enforcement and police, nor the presumed approval by everyone, including the public, of a system dedicated almost exclusively to enforcement and punishment as distinguished from rehabilitation and integration into the community. Strict enforcement of court orders is essential, and we do not intend to allow it to be weakened. Indeed, we have set up a comprehensive enforcement court that has been so effective in that area that the Legislature recently signaled its support for statewide expansion. But this picture of the present is precisely what we do not wish to reinforce or to freeze. The Special Master notes the heavy caseload of probation officers -- an average of 175 cases per officer, and in one county as much as 300. His implication, and a correct one, is that it is impossible under present circumstances for most probation officers to do more than a telephone call or a visit, to say nothing of effective rehabilitation and integration into the community. The point of difference is that we are determined to change that situation and will not surrender to present circumstances by making it even more difficult in the future to do so. That is precisely one effect of membership in the PBA: it would make our task more difficult, and make the achievement of our goals less likely.

We agree with the Special Master that the testimony,

perhaps because of the nature of the issue, was such that a true factual determination could not be made, and here we are referring to the difficulty of evaluating the risk of damage to probation's future. Our concern is with the risk itself, and the extent of the risk, and the values threatened by the risk. We believe the risks substantial, and we know that the values are. That today's probationer views the probation officer as "enforcing" good behavior rather than as an instrument for rehabilitation may be all too true, but again it is not a condition we are willing to strengthen. That the public, according to the Special Master, would applaud PBA membership proves, to us at least, the urgent need to continue to transform probation not as membership in the PBA would, but to transform it to the extent suggested above, and in a way that the public would understand, in order to give probation the chance to prove its rehabilitative powers so that the public would applaud successful rehabilitation of offenders, successful integration of those offenders as productive citizens in our community, successful reduction of recidivism, and a successful slowing down of the escalating costs of prison construction and operation.

The Special Master notes that "there is no evidence one way or the other" on whether the probation officer, because of PBA affiliation and membership, will act differently toward those he or she is to supervise or investigate. We respectfully disagree. We believe the affiliation membership itself, along with PBA's constitution and goals, is evidence of its likely impact on probation officers. This is not an organization that has been a nullity, without influence on its members. It actively promotes the interests of the police with the Legislature and the Executive. It has a formidable presence in society. The Special Master observes that the effect on <u>each</u> probation officer will depend on the officer's professionalism, that being the Special Master's "view of human nature." Certainly the impact of being affiliated with the PBA on each probation officer who is a member cannot be predicted with any confidence; it obviously depends on the individual. But the Court <u>can</u> predict that it <u>will</u> have some impact on all such probation officers, an added police influence in their work, and that it may, and probably

will, actually effect many of them in their work, however subtly. The Court must be concerned with how the overall impact of the affiliation, its probable direction, its likelihood of influence, will affect the probation officers' relationship with probationers, even though "it will," as the Special Master points out, "depend on each individual." Certainly the strength of the movement of probation officers to associate with police, whether in the FOP or in the PBA, is testimony to the conclusion that the risks of identity and influence is more than minimal.

Our determination and the foregoing observations adequately indicate the extent of our disagreement with parts of the Special Master's finding, report, and recommendations, and the basis for that disagreement. Among other things, we differ with the statement that "it would appear that membership in the Fraternal Order of Police or Policemen's Benevolent Association will not affect the functions of probation." That conclusion of the Special Master is presumably qualified by his prior observation of the inability on this record to make a "true factual determination." Whatever the probability of truth may be in that prediction as applied to probation as it exists today, we find the risk of that effect unacceptable, even today, and totally unacceptable in terms of the future.

We realize that the identification of probation officers as police and the impact of that on the probation function, both present and future, while a conclusion based on our own knowledge and experience, as well as that of Mr. Goldstein and other experts in the court system charged with responsibility for the probation function, is a conclusion at odds with the views of many probation officers. Those holding a contrary view note that probation officers will not wear PBA badges, they doubt that the identification of probation officers as police officers will be any greater than it is now; and they suggest that it will not cause damage, noting the existing, albeit unauthorized, membership of some probation officers in the FOP, Despite these contrary views, we must act on our own best judgment. our responsibility is clear, as is our authority. It cannot await painstaking surveys and statistical analyses of potential public perceptions and the potential effects on probation officers, with

all of th uncertainty accompanying such studies. Our responsibilities call for practical judgments, not scientific certainty. Furthermore, resolution of the issue is not amenable to anything even approaching scientific certainty. Government, including the judiciary, is permitted to use its power based on its best judgment, so long as it is rational. Government is not obliged to demonstrate itself as an unerring soothsayer.

Nor can we afford to wait for the effect of police identification to set in. Some probation officers argue that if some individual officers do not do their job right, if they act more like police than probation officers, if they err toward punishment at the expense of rehabilitation, then specific corrective action can be taken -- they can be disciplined or dismissed. We reject that suggestion. As Mr. Goldstein noted the nature of the probation function allots a significant portion of the officer's work to discretion, and that discretionary aspect is almost impossible to monitor. Since we cannot detect the damage, we must try to eliminate the risk. We must assure that the fundamental conditions of employment do so, that they are consistent with the policies of the Court.

(6) The Court's position and the Special Master's report: the risks presented by FOP membership

While the significant differences between the FOP and PBA effectively undercut the argument that no harm to the probation function will result from PBA membership inasmuch as allegedly none has resulted from the unauthorized membership of some 600-800 probation officers in FOP, those differences still leave us with the question of the justification for prohibiting probation officer membership in FOP.

Given the differences in the activities of these two organizations and even in their stated goals and stated permissible activities, the risk to the probation function from FOP membership does not at present appear to equal the risk of PBA membership and affiliation. FOP prohibits political and

legislative activity; it is not "a labor union" and may not become affiliated with any union of industrial workers. Although the Special Master found that in fact the FOP, like PBA and PANJ, has engaged in political activity, he also found that it was "primarily a social and fraternal association," and that the activities of probation officers as members were limited to social and fraternal relations.

The crystal clear fact remains, however, that the FOP is an organization devoted to the interest s of police. It is a police organization. It announces itself as such; it functions as such. And there is some inevitable risk that in fact and in appearance it will affect probation officers. We say this on the basis of logic and experience, and even though we have been unable in these proceedings to measure any actual damage done by prior membership by probation officers, the risk is obviously there.

We agree that the FOP's constitutional prohibition against membership by anyone who is not a law enforcement officer is irrelevant to the issue before us. That is a matter for FOP determination, and if it decides that probation officer membership does not conflict with its own constitution, we have no business interfering with that determination.

While the resolution of the question is not as clear as it is with PBA, we conclude that our duty to preserve the impartiality of the probation function in fact and in appearance, and probation's ability to continue to implement our existing programs and future plans, must not be subjected even to the lesser risk posed by such membership. That the judiciary cannot control or keep track of the possible evolution of FOP and the possible changes in its policies or activities should be obvious from this record, for we were unaware of the very substantial violation of our prior orders prohibiting FOP membership.

Associational rights are precious and should not be restricted without reason. But where important legitimate interests are involved, compelling interests, government must be

practical in its protection of those interests. The risk may increase in the future; it may remain the same. But if government's justifications for action are basically sound, we do not believe government is required to constantly measure the balance between risk and associational rights in order to support its decision. If one believes, as do we, that the identification of probation officers as police and the influence of probation officers by police are inconsistent with the essential impartiality of the judiciary and as well with important goal of the judiciary, then the level or risk involved here is not acceptable; it is much more than minimal and we know of no other way to effectively eliminate it.

A decision barring future membership in PBA but permitting continuation of the present unauthorized membership in FOP is not simply incongruous, it would be a policy going in two different directions at the same time. The Court will not at the same time create new protections for probation while destroying those that previously existed. Both are needed, even though one seems more badly needed than the other.

A most significant fact bearing on the relevance of the lack of proof of any impact of FOP membership on the performance of probation officers is the history of that FOP membership. The 600 to 800 probation officers who became FOP members did so under circumstances that suggest they were then uniquely unattached to the FOP and therefore unlikely to be influenced by its activities. Five hundred and fifty of them joined wholesale, not as individuals expressing a desire to become involved in FOP, but as probation officers who were members of collective negotiation units whose representatives decided to bring all of them in, en masse, as FOP members. They did not apply individually for membership, they did not pay for membership. Their unions, in Bergen, Essex, Hudson, Passaic and Union Counties, decided that they would become members; the union paid their membership dues, at which point they each automatically became members. Their motivation was simple; they wanted the benefit of certain kinds of group insurance that afforded them coverage at lower rates than they

would otherwise get. It is hardly a measurement of the potential of bona fide FOP membership on the function of probation to note the lack of its impact on these particular members. We do not challenge the legality of legitimacy of such membership, we simply note its nature.

The fact that probation officers, and perhaps the public, are quite content with present arrangements, content with FOP membership, the fact that they appear, when stated, to be neutral, benign, unimportant, because they are "social and fraternal," all of this masks the obvious truth underlying the association. Why the Fraternal Order of Police? Why not Rotary, Kiwanis, Knights of Columbus, or hundreds of other social or fraternal organizations, even some with activist agendas? It is the police function that attracts, it is the identification by the probation officers themselves with the police and vice versa that is underlined. It is the striking manifestation, no matter how benign, of precisely what this Court is trying to avoid, to prevent, and to eliminate. If the public does not mind, if probationers do not mind, it is because they already believe that probation officers are police. If we are ever to change that perception, this membership cannot be permitted.

We need no wait to act until the organization -- an organization dedicated to professionalism, not a labor union, not involved in politics of legislation -- begins the process of transformation, in competition with the PBA, that has occurred with other similarly professional, non-labor organizations in the public employee field. The New Jersey Education Association at one time proclaimed itself as a professional organization uninvolved in politics, legislation, our union activities. We note that after these proceedings began, a local lodge of the FOP filed a petition to be the exclusive labor representative of the probation officers of Essex County, the largest group of probation officers in the States. The State FOP's constitution has a statement that it is not a "labor union." We need not calibrate the FOP activities, day-by-day, month-by-month, or year-by-year, to determine the moment that the balance shifts and when the risk becomes apparent enough to others to justify

our action. Police or probation: the two simply do not mix, and the risk of the mix, we conclude, justifies this associational abridgment.

(7) Other issues

Since we did not submit any constitutional issues to the Special Master, he properly declined to rule on counsel's oral contentions made at the hearing. Briefs were not submitted to was any record developed specifically directed at those issues. Our ruling today is administrative, based on our exclusive power over the administration of justice, a quasi-legislative power. Obviously our courts are available, including this Court, to adjudicate any constitutional issues related to this matter that may be raised in appropriate litigation. We note, however, that Article I, Paragraph 19 of the New Jersey Constitution does not appear to be involved, since PANJ does not seek to have the PBA as its negotiating representative.

The Court expresses no opinion on whether police officers are prohibited by N.J.S.A. 34:13A-5.3 from becoming part of collective negotiation units that include probation officers. As the Special Master's report suggests, it is a question affecting the rights of police, not the rights of probation officers, and, as such, is a question inappropriate for administrative determination by this Court.

On an unrelated aspect of the matter, we note the Special Master's observation that probation officers would likely designate PANJ as their collective negotiations representative if a state-wide election were to be held. Putting aside the question of its relevance, we note simply that we do not predict election outcomes.

D. CONCLUSION

To summarize, we have decided to maintain the Court's policy prohibiting probation officers from becoming members of law enforcement organizations. This decision applies to both the PBA and the FOP, even though we recognize differences

between the two organizations. In addition, we cannot allow the PANJ to affiliate with the PBA. We decide there matters on the basis of Court policy.

The Court's decision is based, as noted at the outset, on the nature of judicial integrity and its essential quality of impartiality; on the fundamental difference between probation and police organizations and the resulting fundamental incompatibility between the two. The Court's decision is further supported by probation as it functions today and by the judiciary's future plans for probation. The consequences of probation officers themselves identifying with the police, and being identified by probationers and the public with the police, threaten, in fact and in appearance, the impartiality of the judicial branch of government. These problems are real today, particularly with case management personnel, from whom the system requires absolute impartiality, and also with probation officers who critically affect matters in which police are interested, who depend on police for information, as well as other probation officers. We are convinced those problems of today will be even worse tomorrow as the probation function heads in the direction of an appropriate balance between punishment and rehabilitation. Rehabilitative efforts will be severely damaged, if not totally frustrated, by an alignment, perceived or actual, between law enforcement and probation officers.

Although some other suggestions have been proposed, we believe that nothing short of strict separation can adequately address the concerns we have noted. Neither a wait-and-see nor an individual-based disciplinary approach is institutionally appropriate. We must continue the prohibition. The integrity of probation and the judiciary require it.

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF PROCEEDINGS CONCERNING Probation Officers' MEMBERSHIP IN LAW ENFORCEMENT ORGANIZATIONS AND PROPOSED AFFILIATION OF PANJ WITH THE PBA

APPEARANCES:
Administrative Office of the Courts by Robert Soloff and Michael Diller, Deputies Attorneys General
Probation Association of New Jersey by David Fox, Esquire and Craig Gumpel, Esquire
Police Benevolent Association by Paul Kleinbaum and Robert Fagella
Fraternal Order of Police by George Tosi, Esquire
Chief Probation Officers Association, Pro Se, by Chief Jude Del Preore, President

By Order of the Supreme Court this hearing officer was appointed 'Special Master' to Create a factual record and recommended findings of fact on issues set forth in the Supreme Court's letter to this officer dated March 3, 1994.

Testimony was taken on March 16, 17, 18, 19 and 21, 1994. The persons who testified were: James Mastriani, Chairman, Public Employees Relations Commission; William Burrell, Chief, Supervisory Services, Administrative Office of the Courts; Raymond Rainville, Chief, Child Support Services, Administrative Office of the Courts; Gregory B. Wilcenski, Chief, Juvenile Probation Service, Administrative Office of the Courts; Harvey M. Goldstein, Assistant Director for Probation Services, Administrative Office of the Courts; Carol Lenahan, President, Probation Officers Chapter, State of Florida Police Benevolent Association; Jude Del Preore, Chief Probation Officer, Morris/Sussex Vicinage and President of the Chief Probation Officers Association; Peter N. Brill, Chief Probation Officer, Bergen County; Eugene J. McGrath, Chief Probation Officer, Camden County; Robert F. Kirchgessner, Probation Officer Passaic County Probation Department; Gregory martin, Senior Probation Officer, Burlington County Probation

Department; Donald W. Reiman, Assistant to the President, State of New Jersey Policemen's Benevolent Association; George P. Christie, Probation Officer, Monmouth County Probation Department; Peter A. Tortoreto, Senior Probation Officer, Camden County Probation Department; David Santobianco, Probation Officer, State of Delaware; Mario Paparozzi, New Jersey Department of Corrections.

There were other persons in Court available to testify but counsel determined that their testimony would be cumulative and they were not called.

In addition to testimony exhibits were introduced into evidence and numbered AOC-1 to AOC-256; PANJ-1 to PANJ-35; FOP-1 to FOP-5; CPO-1 and CPO-2.

Eighteen stipulations were read into the record.

The questions framed by the Supreme Court for which it desired a factual record and recommended findings of fact are:

1) What impact, if any, will membership of Probation Officers in the FOP or the State PBA have on the probation function?

2) Will the affiliation of PANJ with the State PBA result in membership in the PBA of Probation Officers who are members of PANJ?

3) What is the present number of Probation Officers who are members of the FOP and what have their activities been in connection with that organization?

4) To what extent, if any, may Probation Officers become involved in or be seen as supporting political activity s a result of membership in either FOP or State PBA?

5) Does the legislation (N.J.S.A. 34:13A-5.3) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non police to

membership imply any legislative policy related to the potential impact on non-police members of such an organization?

The interest of the Supreme Court was amplified by comments and sub-questions within each of the above categories, as set forth in the Court's letter to the Special Master. This report attempts to comply with that directive.

This report doe not and the assignment of this Special Master was not intended to make findings concerning the question of whether a Probation Officer was a "Law Enforcement Officer", nor the question of the propriety or right of any "Union" to be a representative for collective bargaining purposes of Probation Officers nor the questions of the right of Probation Officers to join any particular union.

QUESTION #1

Probation was established by statute in New Jersey in 1900, however, prior to that time an informal probation supervision was used by the Courts when sentencing persons convicted of the commission of a crime. Since that time the functions of the Probation Department have expanded and extend far beyond the supervision of people convicted of the commission of a crime.

Probation, in New Jersey, has always been the Department used to provide services needed by the judiciary. In the area concerned with Criminal Justice the Probation Department currently conducts bail investigations and pre-trial intervention investigation (including those authorized by CDS status). Post-conviction it conducts pre-sentence investigations. All investigations are reduced to reports submitted to the Court. Persons placed on probation, after conviction, or as a condition of bail or as a condition of pre-trial intervention, are supervised by Probation Officers. At the present time there are 72,000 adult convicts under the supervision of Probation Officers and an additional 3,000 adults under supervision but not on probation (e.g. pre-trial intervention). The present average case load for those Probation Officers supervising such people

is 175 cases per officer, while in one county the case load is 300 cases per officer.

In addition to its activities for the Criminal Division of the Superior Court, the Probation Department is charged with conducting the same or similar activities for the juvenile section of the family division of the Superior Court. At the present time there are 11,000 juveniles under supervision of the Probation Department within the state.

Probation has also been charged with other duties. It serves as a collection arm of the court in child support cases, of which there are presently 267,000 such cases. It required to conduct investigation s concerning child custody, see to collections in civil penalty cases, seek out places in which community service may be performed, assign persons to such work and oversee the myriad details in connection therewith. In short, the Probation Department is required to do any act which a court requires to be done to enable the Court to perform its duty.

The testimony and evidence submitted with respect to the impact of membership in a police organization upon the probation function was not such that a true factual determination can be made. The testimony was opinion and speculation.

The Administrative Office of the Courts voiced the following concerns:

1) Membership might encourage Probation Officers to cooperate with police in the law enforcement process, such as being an informant or acting in an 'undercover' capacity. This, it is believed, would send a double message to the probationer who is under supervision.

2) Probation is not law enforcement, it is a blend of duties (in the Criminal Division) which encompass enforcement of the Court order and counseling to effect a change in behavior. The Probation Officer has substantial discretion in determining when and if to issue a complaint for violation of probation.

3) The success of the probation function of assisting a person to change his behavior will be adversely affected if the probationer looks upon the Probation Officer as a policeman rather than a helper.

4) Probation, as an arm of the judiciary, must maintain the same impartiality as the Court. The reports prepared for the judiciary must always be fair and objective. Association with the police would adversely affect the perception of the probationer and the public toward the Probation Department, seeing it as no longer an impartial entity. It is feared that the public would cease to be cooperative with the Probation Officer if probation were no longer viewed as an impartial entity.

5) It would be difficult to monitor the conduct of Probation Officers because there are many subtle discretionary decisions which Probation Officer must make every day in supervising a probationer.

The concerns, as expressed by members of the Administrative Office of the Court, have little empirical evidence from which a factual determination may be made concerning their validity. On the other hand, there is little empirical evidence to indicate their lack of validity. Those officers who testified and who have been members of the Fraternal Order of Police stated that such membership did not affect their performance of duties. Mr. Goldstein testified that he has no objective evidence relating to Probation Officers who were also members of the Fraternal Order of Police nor as to how such membership may have affected them in the performance of their duties. Two of the Chiefs of Probation who testified admitted membership in the FOB during their tenure as Probation Officers. Since they have been promoted to Chief, it can be inferred that their duties and their performance was not compromised by such membership. A factual recommendation is difficult because the conclusion to be drawn will be based upon the philosophy and experience of the decision maker, that is

1) The perception of human nature as able to withstand the subtle bribery of friendship or steadfastness in

living up to the moral and ethical standards required by a particular employment.

2) The belief in the professionalism or lack thereof of Probation Officers as a whole, or an individual Probation Officer, in the performance of duty and adherence to oath.

There are presently members of the Probation Department who are former police officers (one who has retained his membership in the New Jersey Troopers Association), members who are married to present police officers and members who count police officers among their family and friends. Thus, it can be found that the subtle pressures, about which concern has been expressed, already exist. There was no evidence presented that these particular members have violated their oaths or duties, however, there as also no evidence that these officers were subjected to any particular supervision or review which could establish that the same did not exist.

In most other states the Probation Department is a part of the Department of Corrections and the duties of parole and probation are combined, at least with respect to the supervision of adults who have been convicted or charged with the commission of a crime. In the opinion of a Probation Officer from Florida and an Officer from Delaware, there was no effect upon performance of duties by being within one office, by being part of the Department of Corrections nor by being associated with police associations. It must be noted, however, that the functions discussed by these witnesses, and, indeed, the emphasis of all parties to this hearing, was upon adult criminal supervision. It appears that the Probation Department or Office in other states does not have the myriad duties of Probation Officers in New Jersey.

While a far more detailed and intense study would be required to come to a fully sustainable conclusion based upon empirical data rather than opinions, it would appear that membership in the Fraternal Order of the Police or Policemen's Benevolent Association will not affect the functions of probation.

The impact of membership in police organizations upon Probation Officers must be considered from two aspects"

1) The effect of their conduct in relation to the probationer

2) The effect on their morale.

The validity of the conclusion reached above that membership will not have an effect on the functions of probation, that is, that the duties will be performed is assumed. The question now posed asks whether, in performing those functions, the Probation Officer will act differently toward those he is to supervise, collect from or investigate.

Again, there is no evidence one way or the other. Again, the conclusion will be based upon the decision maker's view of human nature and the professionalism or lack thereof of any particular officer.

No one presented evidence concerning Probation Officers views toward the functions of collection of payments and child custody investigation. It would seem however, that since those functions would not be affected by membership in a police organization that the conduct of the Probation Officer in performing those functions would not be affected.

Evidence was received concerning the role of supervision of probationers. The testimony of exhibits firmly establish that the Administrative Office of the Courts, The Probation Departments, the Probation Officers and the Judges ;consider the supervision function of the Probation Officers to be the most important. [Exh. AOC-1 p. i Exec. Sum; I-Intro.]. Recognition is given by all to the fact that, although such supervision ideally incorporates assistance and counseling and the "broker-ing' of services needed by the probationer, there is little time that can be spent on functions other than strict supervision and enforcement of the probation order. One officer testified that, at best, he can devote 30 minutes in a week to the role of counsellor, while Exh. AOC-1 states that a

Probation Officer can devote less than 10 minute per week to the supervision of each probationer.

It was clear to this hearing officer that everyone recognizes that the increase in work load has transformed the original ideal of probation from rehabilitation to, as one witness described it, 'prison without walls'. The prison population has doubled between 1980 and 1993 and probation case loads have quadrupled. While criminal conduct continues to increase and as probation staffing fails to increase the function of supervision will remain the primary function of the Probation Officer. (Testimony indicated that there is a need for twice as many Probation Officers as presently are employed). As Such, membership in a police organization will not affect the conduct of the Probation Officer toward the probationer. Indeed, Exh. AOC-1, p. 7 recognizes that "The Probation Officer plays a crucial role in protecting the community".

The evidence also indicated that probationers currently look upon Probation Officers as enforcers of the Court Order, although it does not appear that the average probationer draws a distinction between a Court Order and the Law. While it would have been helpful to hear from some probationers, and while it would add substance to any conclusion to do a study with many probationers, this officer believes, from the evidence presented, that probationers view the Probation Officer as involved in enforcing good behavior rather than as an instrument for rehabilitation.

The legislative policy and that of the Supreme Court has shifted from rehabilitation to punishment since the adoption of NJSA 2C:1-1 et seq. in 19878. Persons convicted of crime know that, based upon that conclusion, this officer recommends a factual determination that membership in the FOP or PBA will not affect the view of the probationer toward the Probation Officer.

Treating the community and the public as the same, it is apparent from the attention given by the media to crime and punishment, that the temper of the times favors punishment, not rehabilitation. In general, the public knows little about the

activities and functions of any Probation Department. The public is however, constantly bombarded in all forms of media with information about the nature and number of crimes committed. Society, throughout the ages, has moved with the pendulum of history from severe punishment to concepts of rehabilitation. While there are still individuals firmly committed to rehabilitation, such as those described by Mr. Goldstein, 'The majority favor more strict punishment. This is established by the success of those candidates for elective office whose anti-crime rhetoric leads to election victories. Although it is most probable that the public would not know whether Probation Officers were members of a police organization, it is this officer's conclusion that such membership would be applauded and that the impact on the public would be a favorable one. Exh. AOC-1, p. 9 recognizes that citizens define criminal justice in terms of protection and prevention. The Final Report of the Committee on Probation Management prepared for the judicial conference on sanctions and probation [Exh. AOC-2] states "One of the most basic expectations of society is that its government agencies and their employees will discharge their responsibilities effectively. Paramount among those responsibilities is the imposition and enforcement of criminal sanctions, such as those imposed on probationers."

The impact on the neutrality of the Probation Officers is a question similar to that discussed above. Since it could not be found that membership would have an effect upon the functions of probation nor upon the conduct of the Probation Officer toward the probationer, short of an individual officer failing to live up to his oath and his duties, the conclusion must be that it will depend upon the individual officer and his sense of right and wrong. There cannot be a generalized answer which would encompass all individuals holding the position of Probation Officer.

There was testimony, by way of opinion, that such membership would enhance cooperation with and the coordination of efforts with law enforcement agencies. This hearing office rejects those opinions based upon the clear testimony of the Chiefs of Probation who have arranged various cooperative efforts. The

cooperation exists without Probation Officers being members of the FOP or PBA, but it must be acknowledged that Chief Probation Officers are members of the Chief of Police Association with the approval of the Administrative Office of the Courts[Exh. CPO-1].

The ability to supervise probationers and to enforce court orders is believed to be encompassed in the above discussion concerning the impact on the functions of probation and the impact of Probation Officers.

QUESTION #2

If PANJ becomes a local of the PBA the individual members of PANJ will become members of the PBA (Stip. #1) Article I, Section 1 of the Constitution and By-Laws (PANJ-21) of the PBA provides: "This association...is a state organization having subordinate and local branches within the state. It grants charters to local branches, and the individual members of each are members of this association and subject to its control and regulation. (Art. I, Sec. 1 & Art. IV, Sec. 2(a). Every local and each member thereof accepting and retaining its charter consents to all of the provisions of these by-laws or amendments thereto. [Stip. #2, #4, Test. D. Reiman] (Emphasis Supplied)

The consequences of affiliation on PANJ members as determined from the Constitution and By-Laws are:

1) Probation Officers will be determined to be law enforcement officers in the opinion of the officers and members of the PBA.

2) PANJ as a local of the PBA "May endorse candidates for local political office only after the state President is notified and has approved. (Art. II, Sec. 2)

3) PANJ will be subject to the jurisdiction of the State PBA "at all times", both of the local and "its respective members" (Art. III, Sec. 1(c). (This is to be contrasted with the

testimony that each local is autonomous)

4) PANJ and its members will be subject to the authority of the State PBA "to approve, modify or reject any local by-law..." (Art. III, Sec. 1(d).

5) PANJ and its members will be subject to the State PBA authority "to prescribe any additional qualifications or conditions for obtaining or retaining membership herein [State PBA] and in any local thereof" (Art. III, Sec. 1(g).

6) State PBA has power "to provide a suitable reward to be paid to informants providing information, leading to the arrest and conviction of any person who is finally convicted of assaulting or killing a PBA member" (Art. III, Sec.l,(I)

7) PANJ shall be obliged to seek and obtain recognition or certification as the exclusive majority representative of employees (Art. III, Sec 2) (This is to be contrasted with stipulation #9 which states :It is not a prerequisite of affiliation with the PBA that a local be a collective negotiations representative)

8) Membership requires "Completion of PTC training and certification" (Art. IV, Sec. 1(a)

9) "The governing and legislative power and control of this association [State PBA] are vested in a board of state delegates consisting of a representative from each local association. Art. V, Sec. 1).

10) Each local elects a state delegate who, among other things, "Shall maintain public relations with local legislators..."

11) Membership must be exclusive in PBA. "Any individual members of any local association who shall join or become a member of any other police or law enforcement agency of which he or she is a member, a purpose of such organization being to represent policemen or law enforcement officers in matters affecting their employment or economic

welfare, shall be expelled from this association and the local association." (Art. VIII, Sec. 1)

12) Art. XII refers to the attorney for the association, Sec. s(b) refers to the locals. The duty of the attorney shall be, among others, to "Prepare all legislation".

13) Art. XIX contemplates support or opposition to legislation which \shall be determined by the state board of delegates.

14) Article XXI contemplates the issuance of "Safety Cards" by individual officer

15) Article XXII contemplates the issuance of "Car Shield" to members.

16) No member shall institute court proceedings against the State PBA or any local without first seeking redress from the association. (Art. XXIV, Sec. 1)

It is not known to what extent the officers or members of PANJ are familiar with the requirements of the State PBA Constitution and By-laws. It is known however, that the members of PANJ overwhelmingly voted to join the PBA. That expression of the membership, as well as the testimony presented, leads to the conclusion that affiliation with the PBA will be beneficial to the morale of the Probation Officers.

The consequence of such affiliation, however, when measured against the Constitution and By-Laws, as identified above, are apparent. Each Probation Officer will be subject to the control and regulations of the State PBA. Probation Officers may be placed in the position of supporting or opposing political candidates of legislation which may or may not be in the best interest of Probation Officers. Probation Officers may be placed in a conflict position where the state organization offers a monetary reward in connection with the arrest and conviction of a defendant convicted of assaulting or killing a PBA member. This, again is an area where the individual integrity and

professionalism of the officer is involved. There is no determination that such membership and such action of the part of the State PBA would cause any officer to fail to properly perform his duties. It is merely the recognition of a possible consequence of affiliation.

Members of PANJ will be unable to select a collective bargaining agent other than PANJ which is ia local of the PBA. Although the State PBA is not directly involved in collective bargaining, it does provide advisers and renders other assistance. This can be a beneficial consequence of affiliation. (Last part of Stip. #5)

Individual members must complete PTC training and certification. The ability to complete such training will have an effect upon the available time of the Probation Officer. Since it is a requirement of the State PBA for membership, it is assumed that the time necessary to complete the training program will be a subject of the collective bargaining process. Excuse from regular duties will have a consequence to the Probation Department and its functions. The requirement that the State Delegate maintain relations with local legislators will involve that Probation Officer in some kind of political activity. (Stip. #10)

Currently, most county probation associations are there own collective bargaining unit and representatives, but the Communications Workers of America is a union which represents some vicinaces. Affiliation by PANJ with the PBA will have the consequence of prohibiting those court Probation Departments from being represented by the CWA. However, with the state take over of all Probation Departments there will no longer be individual county employee groups. Since there has already been a large vote in favor of affiliation with the PBA it is reasonable to infer that, in a representation election, the majority will vote for PANJ as its representative. However, no evidence was presented with respect to the representation rights which now exist in the CWA. It is to be noted that the CWA was not a party to the hearing conducted and the specific question of union representation was not part of the charge to

this Special Master.

An important consequence of membership in the PBA is the authority given to the individual members to issue "Safety Cards" and install PBA 'Car Shields' in a manner now done by police officers. If this conduct is regulated and supervised by the Chief Probation Officers in each vicinage, it will not necessarily have a bad effect. It is noted in response to the question of consequences of affiliation.

This special Master does not see any consequences, for good or ill, upon the current PBA members. Since public employees are not permitted to strike, there is no benefit to either group in its collective bargaining.

The consequence of affiliation to the organization of the Probation Officers Association is similar to the consequences to each individual member as set forth in the discussion of the Constitution and By-Laws of the State PBA. It will lose its present autonomy as an organization.

QUESTION #3

There are between 700 and 800 New Jersey Probation Officers who are presently members of the Fraternal Order of Police, (stipulation #12, 13, 14, 15, 16) and have been for 20 years. It is noted that disobedience of a Supreme Court directive does not justify continued disobedience, however, events occurring or failing to occur during that time will be evidential in this hearing.

The Certificate of Incorporation of the Fraternal Order of Police recites:

"2. The purpose for which this corporation is formed is to further and encourage a high degree of skill, efficiency and discipline among all persons who are or may become employed in any rank thereof as police officers, park guards, state police, or as police officers or law

> enforcement officers of any port authority or interstate commission, or by any federal, state or municipal entity, or any political subdivision thereof, for the protection of public safety; to cultivate friendship among its members; and to improve the moral, intellectual, social and economic conditions of the active members of this association by conducting, maintaining, and operating through subordinate local lodges or chapters, together with affiliated ladies auxiliaries, and such other memberships of public spirited citizens as may be added thereto from time to time. It is a corporation which does not contemplate any pecuniary profit or gain, either incidental or otherwise, to its members. This corporation is not a labor union; and it shall not be or become affiliated, wither directly or indirectly with any committee, Congress, federation, organization or union of industrial workers.

The testimony of those Probation Officers who are members of the Fraternal Order of Police, which testimony is accepted as true, is that the organization was social and fraternal, that the individual lodges to which the members belonged never engaged in any political activity for or against candidates or for or against legislation. These Probation Officers stated that they were never asked for help in the detection of crime or enforcement by police members.

From the testimony it would appear that the experience of these members of the Fraternal Order of Police was a social and fraternal one.

The By-laws of the New Jersey State Lodge Fraternal Order of Police (Exh. FOP-5) sets forth virtuous purposes in its preamble and contains, among others, a pledge "To use all honorable means to promote police legislation and a greater sociability and fraternity in the state of New Jersey." The By-laws also provide:

1) The organization is strictly non-political and shall have no affiliation with any labor union or political action committee. (Art. I, Sec. 2)

2) Provides for Associate members of persons interested in the welfare of the police and their profession. (Art. II, Sec. 1(c)]

No evidence was presented with respect to the nature and quality of the activities of the members of the Fraternal Order of Police other than as indicated. The recommended finding of fact, therefore, is that the Fraternal Order of Police in New Jersey is a social and fraternal association and that the activities of its members ore social, non-political and non-labor oriented. However, lodges in other states have represented Probation Officers in collective bargaining. (Stip. #17, Exh. PANJ-35]

QUESTION #4

Without repeating the discussion in #3 and #2 above:

The Fraternal Order of Police is not engaged in partisan political activity.

The Policemen's Benevolent Association is, from time to time, engaged in partisan political activity. It may support or oppose candidates for elective office and support or oppose legislation. The testimony indicated that this action on legislation is normally confined to legislation which affects the members of the PBA, however, there is no limitation in its constitution and by-laws, as there is in the by-laws of the Fraternal Order of Police. It should be noted that the use of the work "Partisan" is not intended to describe the PBA as being pre-disposed for or against any political party. It is recognized that its activity, although in support of or opposition to a candidate for elective office, is not determined by the political party to which that candidate belongs.

QUESTION 5

James Mastriani, Chairman of PERC testified that there is little legislative history available concerning NJSA 34:13A-5.3. In interpreting that legislation PERC has relied on the rationale expressed by the Courts.

The Chairman's opinion is that the statute was designed to protect the public employer and the public form problems that could develop in labor disputes if the police officers were subjected to divided loyalties. Police are to protect person and property, even in a labor dispute. The divided loyalty could arise if a policeman was a member of the same union as the employee who was on strike against a non-public employer.

Mr. Mastriani believes the purpose of the statute is to have collective bargaining without divided loyalties and to avoid problems that could arise if police and non-police were members of the same bargaining unit.

It is to be noted that each local of the PBA is a separate bargaining unit for its members and that PANJ, as a local, would be the bargaining unit for the Probation Officers.

It was not the duty of this Special Master to interpret or apply the statute to either police officers or Probation Officers. There is no determination by this Special Master that the statute will or will not apply to police locals or Probation Officer locals of the PBA. The applicability of the statute with respect to the police is the initial function of PERC. The Commission will conduct its own investigation into the duties and powers of the members and will make its own determination of whether persons are classified as police or non-police. The Chairman stated that all cases of this kind are fact sensitive. Generally, the power of arrest, the right/duty to carry a gun, to detect crime, apprehend criminals will be evidence of police activity, however, he could not apply the criteria in the abstract.

It is to be noted that PERC's jurisdiction does not extend to the

employees of the judicial branch of government. If PERC were to determine that Probation Officers are not properly within the category of police, that determination would affect the police locals of the PBA but not the Probation Officer local. PERC does not act on behalf of the judiciary automatically. It will give advice, when requested. It will act when the judiciary gives it the right to proceed. Should that authority be delegated to PERC by the judiciary, then the commission will handle the matter in the same way that it handles all matters, however, it can only make a recommendation to the judiciary, it cannot enter any order nor enforce any recommendation.

SUMMARY

Recommended Findings of Fact:

1) Membership in the Fraternal Order of Police or the Policemen's Benevolent Association will not impact the function of probation if the Probation Officer is an ethical professional with integrity.

2) The Philosophical concerns expressed by the Administrative Office of the Court exist from familial and societal associations, regardless of membership in any formal organization.

3) The experience in other states wherein the function of probation and parole are united in one department, and often in one officer, has not demonstrated any adverse impact upon the function of probation.

4) the present inadequate number of Probation Officers and the large number of probationers has caused probation to become an organization which is expected to protect society and deter the commission of crime.

5) Probation Officers, probationers and the General public view probation as supervision and enforcement of the terms of probation, and as a form of punishment.

6) The affiliation of PANJ with the State PBA will result in Probation Officers becoming members of the PBA

7) Affiliation of PANJ with the State PBA will result in the PBA considering is to be "Law enforcement officers".

8) Affiliation of PANJ with the State PBA will result in PANJ and each Probation Officer member being subject to the jurisdiction of the State PBA, including any future required qualifications.

9) Affiliation of PANJ with the State PBA will result in the requirement that PANJ obtain recognition as the exclusive majority representative for collective bargaining purposes.

10) Affiliation of PANJ with the State PBA will require all Probation Officer members of PANJ to complete a PTC training program.

11) Probation Officer members of PANJ will be permitted to issue PBA 'Safety Cards' and receive 'PBA' Shield for the automobiles.

12) In an election which permitted only a vote for affiliation with the State PBA or no affiliation, such affiliation received an overwhelming vote of the members of PANJ.

13) Affiliation of PANJ with the State PBA will produce a representative election with the Communication Workers of America and, potentially, other labor unions.

14) Probation Officers have been members of the Fraternal Order of Police for approximately 20 years.

15) There are presently between 700-800 Probation Officers who are members of various lodges of Fraternal Order of Police.

16) Fraternal Order of Police is primarily a social and fraternal association.

17) PANJ, PBA and FOP have engaged in political activity as organizations.

18) A prohibition by the Supreme Court against political activities by members of any organization would have to exempt the individual officers engaged in such activity on the part of the organization.

19) NJSA 34:13A-5.3 restricts police officers from being members of an employee organization (collective bargaining unit) which also represents non-police employees.

20) The statute is to protect the public employer and the public from the potential of divided loyalty on the part of a policeman. Any effect upon the police or non-police members of an organization which admits both to membership is a tangential effect.

EPILOGUE

The Special Master believes that the preceding report has complied with the mandate of the Supreme Court as set forth in its letter dated March 3, 1994. However, because of the seriousness of the issue and because the Special master was permitted flexibility in the conduct of the hearing, it is believed that other matters should be called to the Court's attention.

The issue which the Court sought to revisit, by its appointment of the Special Master, concerned the continuing appropriateness of the interpretation of the Court's 1975 disapproval of a Probation Officer's application to become a member of the Fraternal Order of Police. This interpretation was set forth in the April 8, 1976 memo of the AOC assistant Director of Probation Fred. D. Fant and its reaffirmation by Assistant Director Goldstein. The attorneys involved in the present hearing, however, sought to obtain a determination of whether a Probation Officer was a 'law enforcement officer' and, a determination concerning the right of employees to joint a union of their choice. many witnesses testified with such view and many of the exhibits placed into evidence were designed

toward this end. Because the rules of evidence did not apply, the Special Master accepted all testimony and exhibits which were proffered, however, the report contains no recommended findings of fact or conclusions on either of these questions.

The Special Master suggests to the Court that it's decision concerning the propriety of Probation Officer membership in the Patrolmen's Benevolent Society or Fraternal Order of Police, while not having an impact on the probation function nor the manner in which a professional Probation Officer conducts his duties, may have collateral effects.

The Special Master does not believe that the right of employees to bargain collectively through an agent of their own choice is governed by membership in the PBA or FOP. The law will require a representation election at the proper time.

The argument that parole officers supervise persons convicted of more serious crime is not established by the facts, but that makes little difference in determining whether an employee of the judiciary may be a member of police organization.

Probation Officers are concerned that rule 1:33 is the beginning of a trend to eliminate probation departments. This may motivate a desire to become part of a strong union but does not address the question of whether an employee of the judiciary may be associated with persons employed by the executive branch. The court should be made aware, however, that there is a strong undercurrent of bitterness among Probation Officers. The recent division of the Court with the establishment of case management offices and assignment of Probation Officers to such offices with supervision by non-members of the probation department has contributed to their concern for their jobs and for the opportunity of promotion.

Testimony of arguments concerning the intensive supervision program were motivated by the confusion created by the changing management structure of the Court. While all members of the intensive supervision teams are former Probation Officers, such title had to be abandoned when a

transfer to the intensive supervision unit was accepted.

In 1900 New Jersey had many courts whose origin was established under common law and which were carried over in successive New Jersey Constitutions. In 1947 our latest Constitution created a more unified Court system, but it too, retained several individual courts with county jurisdiction. Today, there is one Court system for the State of New Jersey and this Supreme Court must integrate the various functions previously performed by County units into a unified whole. The difficulties being experienced are natural to the evolution of change. Change has also occurred, as it does every other generation, in the perception of the public concerning public employee functions. The Court has recognized this in its willingness to revisit its 1974 position of Probation Officer membership in police organizations. It is the hope of this Special Master that he has assisted the Court in its ultimate conclusion.

Respectfully submitted

Paul R. Huot

Supreme Court, U.S.
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Nos. 96-790 and 96-635

In the Supreme Court of United States
October Term, 1996

Probation Association of New Jersey, Petitioner,
v.
Deborah T. Poritz, et al., Respondents.

Robert F. Kirchgessner, et al., Petitioners,
v.
Robert N. Wilentz, et al., Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Pickering v. Board of Education, 391 U.S. 563 (1968), which calls for the balancing of a public employer's interest in efficient operations against public employees' interests in commenting on issues of public concern in determining the constitutionality of public workplace limitations on speech, applies to restrictions on public employees' expressive associations, or whether such restrictions should be reviewed in accordance with case law applicable to political patronage.

2. Whether the lower courts properly applied the balancing test found in Pickering v. Board of Education, in finding that the New Jersey Supreme Court's interests in maintaining the impartiality of the state's judiciary outweighed the interest of the judiciary's probation officers in affiliating with law enforcement organizations.

3. Whether petitioners stated claims that liberty or property interests were taken without due process of law.

4. Whether a federal court claim against justices of a state supreme court, in their official capacities, is barred by the Eleventh Amendment to the United States Constitution.

5. Whether the district court abused its discretion in declining to exercise supplemental jurisdiction over purely state law claims involving novel issues regarding the relationship between the state's judiciary and its employees, where all federal claims had been dismissed.

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Nos. 96-790 and 96-635

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Deborah T. Poritz, et al.,

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Robert F. Kirchgessner, et al.,

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v.

Robert N. Wilentz, et al.,

Respondents.

Respondents' Consolidated Brief In Opposition to Petitions for A Writ Of Certiorari

COUNTERSTATEMENT OF OPINIONS BELOW

The Petitions filed in this matter fail to note that the district court's opinion is reported. Kirchgessner v. Wilentz, 884 F. Supp. 901, 149 L.R.R.M. (BNA) 2718 (D.N.J. 1995). The decision of the United States Court of Appeals for the Third Circuit is referenced in a "Table of Decisions Without Reported Opinions." Kirchgessner v. Wilentz, 92 F.2d 171 (1996).

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION.

The central issue in this case is whether the supreme court of a state, in order to ensure the impartiality of the state's judiciary, in appearance and in fact, may impose reasonable restrictions on job-related associations of employees of the judiciary. The district court, finding that the "vital importance" of "maintaining impartiality both in appearance and in fact" is of greater concern for the judiciary than for other branches of government (P. App. 29-31)[1] upheld associational restrictions imposed by the New Jersey Supreme Court. In doing so, the district court did nothing more than apply the same balancing test, the one found in Pickering v. Board of Education, 391 U.S. 563 (1968), as has been applied by every circuit of the United States Court of Appeals that has had occasion to decide what test should be used in determining the constitutionality of restrictions on public employees' expressive associations.

The complaints in this matter challenged the right of the State of New Jersey's Supreme Court, which reaffirmed a longstanding policy that probation services are an "integral part" of the judiciary, to prohibit the alignment of probation officers with organizations which publicly pronounce themselves to be "law enforcement organizations." The New Jersey Supreme Court decided that its approximately 1,500 probation officers may not affiliate themselves with police organizations because the police, in public appearance and in fact, are inextricably linked in the criminal justice system to the prosecutorial side of the adversary process.

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[1] All references to P. App. are references to the appendix to the Petition of the Probation Association of New Jersey.

Under the New Jersey constitutional scheme, the New Jersey Supreme Court exercises plenary authority over all aspects of the administration of the Judicial Branch of State government. The New Jersey Supreme Court, in promulgating the policy challenged here, acted in a quasi-legislative capacity. Its review was conducted in the context of an expressed interest by the Probation Association of New Jersey ("PANJ"), the representative of all probation officers, to affiliate with a police organization. PANJ has been recognized as the exclusive bargaining representative of probation officers. The right of probation officers to unionize is not at issue in this case, only their right to select a union identified as a law enforcement organization.

The New Jersey Supreme Court reviewed the different functions of probation officers and police officers, made judgments regarding the impacts that membership in law enforcement organizations would have on the appearance of impartiality of the judiciary and considered, in a common sense fashion, how such membership would affect that impartiality in fact. While petitioners might disagree with the policy judgments made by the New Jersey Supreme Court, the underlying reasonableness of those judgments is unassailable and outweighs probation officers' interest in joining law enforcement organizations.

II. PROCEDURAL AND FACTUAL BACKGROUND

In these two consolidated actions, petitioners, seven named probation officers in one complaint (the Kirchgessner Complaint) and an independent union, the Probation Association of New Jersey representing probation officers, in the other complaint (the PANJ Complaint), filed an action in the United States District Court for the District of New Jersey and sought an injunction enjoining the New Jersey Supreme Court's policy prohibiting probation officer membership in police organizations.

The central claim of petitioners was that the New Jersey Supreme Court's restriction on membership in police organizations was a violation of petitioners' associational rights. The Kirchgessner Complaint also alleged certain self-styled due process violations and both complaints alleged state law violations arising out of New Jersey constitutional and statutory provisions regarding public employees organizational rights. Neither complaint contained a claim that these state constitutional or statutory rights created property or liberty interests which were the basis for a due process claim. (P. App. 18a, 19a, 35a).

Respondents moved to dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds, among others, that, given the State's paramount interest in maintaining an independent and impartial judiciary, the prohibition of probation officer membership in police organizations is of the type that a public employer may reasonably place on its employees. With respect to the state law claims, defendants argued that supplemental jurisdiction should not be exercised, that the district court's jurisdiction over state law claims was barred by the Eleventh Amendment of the United States Constitution and, finally, in any case, petitioners' allegations did not constitute a violation of New Jersey constitutional or statutory law.

The district court granted respondents' cross-motion to dismiss and denied petitioners' motions for a preliminary injunction and class certification as moot. Addressing the central issue in the case, the district court stated:

> The Chief Justice and the Associate Justices made a reasonable determination that membership by probation officers in the State PBA and the FOP will impair the impartiality of the judiciary in fact and appearance. It appears this harm is "real" and "not merely conjectural." National Treasury, 115 S.Ct. at 1017. Further, the interest in maintaining the

> appearance of impartiality of the judiciary outweighs the desire of the Plaintiffs to affiliate with law enforcement organizations.

(P. App. 32a-33a). The court found that, "beyond doubt," the remaining federal claims lacked merit (P. App. 36a-40a). Finally, the court exercised its discretion and declined to exercise supplemental jurisdiction over the state law claims (P. App. 40a-42a). Hence, the federal claims were dismissed with prejudice and the state law claims were dismissed without prejudice. The district court's Order was affirmed without opinion on July 19, 1996 by the United States Court of Appeals for the Third Circuit. (P. App. 1a).

The present controversy arose when the New Jersey Supreme Court was asked to revise its longstanding policy prohibiting probation officer membership in police organizations. In order to review the matter, the Court asked a Special Master to address certain issues regarding the impacts of probation officer membership in law enforcement organizations. (P. App. 53a). While generally finding that membership in the FOP and PBA will not have an impact upon the function of probation if the individual probation officers are ethical professionals with integrity, the Special Master's opinion acknowledged that a "true factual determination" could not be made (P. App. 58a), that ultimately the issues turn on one's view of "human nature," (P. App. 60a-63a) and that it is not possible to provide a generalized answer that would be applicable to all probation officers (P. App. 67a).

After reviewing the Special Master's report, the New Jersey Supreme Court issued a decision reaffirming its longstanding policy prohibiting probation officers from membership in law enforcement organizations (P. App. 88a-124a). That decision turned on "the nature of judicial integrity and its essential quality of impartiality" (P. App. 90a), the inclusion of probation within the judiciary, and the

role of law enforcement as one of the adversaries that appears before the judiciary.

In reviewing the issue of probation officer affiliation with police organizations, the New Jersey Supreme Court discussed the basic function of probation, the policy which requires a separation of the probation function from law enforcement and the impact on the probation function, both in appearance and fact, of probation officer membership in police organizations. While the roles of probation officers, as employees of the judiciary, have some similarity to roles of executive branch parole officers, there are also substantial differences.

Historically, the primary function of probation has been the enforcement of court orders, including the conditions of probation. It also includes, in appropriate circumstances, the presentation of probation violation reports to judges. This central function includes both punitive and rehabilitative components which must be balanced by the probation officer (P. App. 93a-95a, 99a, 100a). More recently, other critical functions have been added to the responsibilities of probation officers such as case management functions (P. App. 109a) including investigating for and preparing pre-sentence reports, bail reports and pretrial intervention reports, all of which are used by judges in making judicial decisions (P. App. 112a, 113a). In addition to discussing probation as it currently functions, the Court also stated that the future of probation is likely to include increasing efforts at rehabilitation. (P. App. 101a-108a).

Considering those functions, the New Jersey Supreme Court determined that it is absolutely critical that probation officers function at arms length from police and police organizations. As the Court stated:

> Probation is an integral part of the judiciary; everything that probation does it does as an arm of

> the judiciary. Among other things, it is the entity that enforces judicial orders. Given the nature and functions of probation, it must be as impartial as the rest of the judiciary, totally so and scrupulously so. Probation cannot take sides any more than a court may. It is not pro-this or anti-that, it is not on the side of either men and fathers or women and mothers, it is not on the side of either prosecutors or defendants. It has no more right to become allied with a public defender's office than with prosecutors or police. Probation represents no special interest in society and government but one: the courts.
>
> Police and police organizations have but one interest and one role: law enforcement. Everything they do serves that interest: investigating crime, apprehending criminals, aiding in the prosecution and conviction of the accused, and in the imposition of punishment. The police stand firmly and properly on one side of the scales of criminal justice -- the prosecution's side.
>
> Put simply, the functions of police and probation -- one serving the prosection the other serving the courts -- are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary. [P. App. 90a-91a]

Exercising its quasi-legislative role, the New Jersey Supreme Court recognized that the effects with which it was concerned were not subject to empirical verification given the highly discretionary nature of the probation officers work and the fact that the impacts of a group affiliation may be "conscious or subconscious," (P. App. 113a), "subtle" (P. App. 116a) and "almost impossible to monitor" (P. App. 117a, 95a). The Court also expressed concern with the impact of public identification of probation officers with the

police function. Specifically, the Court noted that the identification of probation officers as "law enforcers" or "police" would affect the willingness of community groups, families and probationers to work with probation officers (P. App. 103a-106a).

The New Jersey Supreme Court also noted that the mere fact that probation officers are choosing to align themselves with police organizations provides a factual basis for its concerns.

> Certainly, the strength of the movement of probation officers to associate with police, whether in the FOP or in the PBA, is testimony to the conclusion that the risks of identity and influence is more than minimal. ...
>
> Why the Fraternal Order of Police? Why not Rotary, Kiwanis, Knights of Columbus, or hundreds of other social or fraternal organizations, even some with activist agendas? It is the police function that attracts, it is the identification by the probation officers themselves with the police and vice versa. It is the striking manifestation, no matter how benign, of precisely what this Court is trying to avoid, to prevent, and to eliminate. [P. App. 116a, 121a].

ARGUMENT

A.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PRECEDENTS OF THIS COURT REQUIRING THE APPLICATION OF A BALANCING TEST TO LIMITATIONS PLACED ON PUBLIC EMPLOYEES' ASSOCIATIONAL RIGHTS WERE CORRECTLY APPLIED BELOW.

Petitioners' argument that Elrod v. Burns, 427 U.S. 347 (1976) and its progeny require the application of "strict scrutiny" to any limitations on the expressive associations of public employees is fatally flawed in two respects. First, these cases have been limited to situations involving political patronage and have not been given broader application to all forms of association. Second, even for political patronage cases, this Court has not applied "strict scrutiny." O'Hare Truck Service, Inc. v. City of Northlake, ___ U.S. ___ 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996); Branti v. Finkel, 445 U.S. 507 (1980); Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990). Although the introductory discussion in the plurality decision in Elrod does suggest the application of "exacting scrutiny," 427 U.S. at 362, to a patronage dismissal of a public employee, as the district court recognized (P. App. 24a), the Elrod case has come to stand for a narrow test to be applied where political patronage is used as a consideration in public employment and contracting decisions. See O'Hare Truck Service, 116 S.Ct. at 2357; Branti, 445 U.S. at 518 and Rutan, 497 U.S. at 74. That test is based on whether party affiliation is an appropriate requirement for performance of the public official or the contract involved. Often that analysis will turn on whether the position is "policymaking" or "confidential." Branti, 445 U.S. at 518. Moreover, while party affiliation is a form of association, there is nothing in

the Elrod line of cases to suggest that the Elrod test is to be applied to other forms of association.

While this Court long ago abandoned Justice Holmes' view that public employment may be conditioned on the relinquishment of First Amendment rights,[2] Keyishian v. Board of Regents, 385 U.S. 589 (1967), it is equally well established "that the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general,'" Connick v. Meyers, 461 U.S. 138, 140 (1983), citing Pickering v. Board of Education, 391 U.S. 563, 568, (1968). Similarly, the State's interest in regulating the associations of its employees, particularly those associations with a workplace nexus, differ significantly from its interests in regulating the associations of the citizenry in general.

Recognizing the significance of the State's interest in managing its workforce, this Court has not applied a "strict scrutiny" test to government restrictions on the speech and associations of its employees. Instead, the Court has recognized "that the government as employer has far broader powers than does the government as sovereign." Waters v. Churchill, 511 U.S. 661 (1994). Therefore, the Court has set a standard that strikes "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568; Connick, 461 U.S. at 140; U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S.Ct. 1003 (1995).

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[2] McAuliffe v. Mayor of New Bedford, 115 Mass. 216, 220, 29 N.E. 517 (1892), "([A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.")

Those circuits that have specifically addressed the question of what test is to be applied to governmental employer restrictions on freedom of association have all agreed to the use of the Pickering balancing test. Boals v. Gray, 775 F.2d 686, 691-2 (6th Cir. 1985); Griffin v. Thomas, 929 F.2d 1210, 1213 (7th Cir. 1992); Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546, 1559 (11th Cir. 1987); Bodie v. City of Columbus, 989 F.2d 745, 749 (5th Cir. 1993).[3]

Moreover, the application of the Pickering balancing test to public employers' restrictions on their employees' associational rights is fully consistent with the underlying rationale behind both the cases establishing those rights and the Pickering balancing test. There is no express grant of a freedom of association in the United States Constitution. Instead, associational rights are derived from other First Amendment rights such as freedom of speech. Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 622 (1984). Because in this case it appears that appellants' alleged associational interests derive from freedom of speech rights, it is appropriate to apply the Pickering line of cases which arise in freedom of speech settings. Moreover, the Pickering line of cases is premised on the different relationship between, on the one hand, the government and citizens it regulates as a sovereign and, on the other, the government and the individuals it

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[3] It should be noted that two of these courts have found that associational interests are only protected in the workplace where they relate to matters of public concern, Boals v. Gray, 775 F.2d at 623; Griffin v. Thomas, 929 F.2d at 1213, whereas the other two circuits found that any associational interests are entitled to First Amendment protection in the workplace. Hatcher v. Bd. of Education, 809 F.2d at 1558. Bodie v. City of Columbus, 989 F.2d at 749. Because, in this case, the New Jersey Supreme Court does not dispute that appellants' associational interests are related to matters of public concern, there is no need to address this split among the circuits. See Sanguigny v. Pittsburgh Bd. of Education, 968 F.2d 393, 400 (3d Cir. 1992).

employs. This difference is equally applicable to analysis of freedom of speech and freedom of association claims. Thus, in determining whether the New Jersey Supreme Court's prohibition on probation officer membership in law enforcement organizations is consistent with appellants' First Amendment rights, the district court and the Court of Appeals properly applied the Pickering balancing analysis.

In conducting the balancing test, the New Jersey Supreme Court's interest in maintaining the independence and impartiality, both in appearance and in fact, of the probation function of the judiciary is compelling. As the New Jersey Supreme Court stated in I/M/O Norma Randolph, 502 A.2d 533 (N.J. Sup. Ct. 1986), cert. den. 476 U.S. 1 (1986):

> We begin by emphasizing New Jersey's unique commitment to an independent judiciary. This concern for an independent judiciary is at the heart of the American legal system. One of the great advances made in the structure of government by our Federal Constitution was its provision for an independent judiciary whose judges could perform their duties as they saw fit without fear or favor ...
>
> "Especially in the administration of the criminal law -- the most awesome aspect of government -- society needs independent courts of justice. [Pennekamp v. Florida, 328 U.S. 331, 356, 66 S.Ct. 1029, 90 L.Ed. 1295, 1309 (1946) (Frankfurter, J., concurring).]" . . .
>
> What can we say of this ideal of judicial independence that has not been said? That "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist No. 78 at 484 (A. Hamilton) (H. Lodge, Ed. 1888); that any lessening [of] the independence of the Judiciary [attacks] not only the judicial power,

> but the democratic republic itself," A. de Tocqueville, Democracy in America, 289 (Vintage Books 1945). [502 A.2d at 537-8].[4]

In New Jersey, the probation function has long been an arm of the judiciary, performing "services for the judiciary essential to the fair and efficient administration of justice." Passaic Co. Probation Officers' Assoc'n v. Co. of Passaic, 374 A.2d 449, 452 (N.J. Sup. Ct. 1977); See also Godfrey v. McGann, 179 A.2d 6 (N.J. Sup. Ct. 1962). In conducting the Pickering balancing test, the Supreme Court's interest in maintaining the impartiality of the probation arm of the judiciary, in fact and appearance, overwhelms probation officers' interests in belonging to police organizations. See United States Civil Service Commission v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 565 (1973). As the New Jersey Supreme Court recognized, police officers, although vital public servants, are fundamentally aligned with one of the adversaries in the criminal justice system, the prosecution. (P. App. 91a). Accordingly, the New Jersey Supreme Court's policy prohibiting probation officer membership in police organizations is permissible even if, to some degree, it has an impact upon those employees' associational interests.

Petitioners place great alliance on this Court's decision in United States v. National Treasury Employees Union, supra, ("NTEU"). In that case, the Court found violative of the First Amendment a total ban on public employees' receipt of compensation for appearances, speeches or articles of any kind. Initially, it should be noted that, in NTEU, this Court clearly reaffirmed the application of the Pickering balancing

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[4] Since the New Jersey Supreme Court's decision in I/M/O Norma Randolph, supra, barring a court attendant from participation in certain civic organizations, the Court has modified the rules governing such activities. See Code of Conduct for Judiciary Employees, Canons 5 and 6; reprinted in Pressler, Rules Governing the Courts of the State of New Jersey, (1997 Ed.), pp. 416-426.

test to limitations on public employees' speech. 115 S.Ct. at 1012. The question in NTEU was what weight should be given to the federal government's interest in prohibiting the receipt of honoraria for a whole host of speech which was unrelated to public employment. As the district court found, after noting that NTEU involved a prohibition on speech which had no relationship to employees' official duties, the NTEU decision is clearly distinguishable from the instant case. (P. App.26a-28a).

The decision in NTEU is replete with references to the lack of a nexus between the speech limitation in that case and public employment:

> The content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work.
>
> They do not address audiences composed of co-workers or supervisors; instead they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audience they address has any relevance to their employment . . . .
>
> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the government is unable to justify section 501(b) on the grounds of immediate workplace disruption asserted in Pickering and the cases that followed it.

115 S.Ct. at 1012, 1015. The Court's decision in NTEU is similarly replete with references to the extraordinary breath of

the speech limitation in that case. By contrast, in this case 1) there is a clear nexus between the work of probation officers and the limitation on law enforcement associations and 2) the limitation is narrowly focused to address the judiciary's concern with maintaining impartiality.

Thus, petitioners' reliance on this Court's statements that the government has a greater burden in the weighing analysis where it imposes a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" than in the case of isolated disciplinary action, NTEU, 115 S.Ct. at 1014, is misplaced. This case falls somewhere between the two extremes of a wholesale deterrent to a broad category of expression and a single disciplinary action, although it is much closer to the latter. The New Jersey Supreme Court's policy pronouncement, which was occasioned by a widespread movement of probation officers to affiliation with police organizations, was directed at a particular category of employees and a specific form of association.

Petitioners also point to the Court's statement, in NTEU, dismissing a government argument that it could not have included a nexus limitation to the ban on honoraria because such a limitation would be administratively difficult to enforce. Again, the situation here is clearly distinguishable. In NTEU, a case-by-case review of the receipt of honoraria for federal employees would be feasible, but inconvenient, in order to determine whether individual instances of compensation would create an appearance of impropriety or create a very real conflict of interest. In contrast, in the instant case, the prohibition on probation officer membership in police organizations is relevant to each and every probation officer, thus making any individual review unnecessary. Moreover, with respect to the concern with the impact of such membership on the actual functioning of probation, the New Jersey Supreme Court determined that the monitoring of individual probation officers to determine such an effect was not just inconvenient, it was "almost impossible" (P. App.

95a, 117a). Thus, unlike the defendant in NTEU, the New Jersey Supreme Court is not relying on mere administrative convenience to support its position.

Petitioners also ignore the fact that, in NTEU, the Supreme Court found numerous anomalies in the provision for the honoraria ban, casting "serious doubt" on the government's purported rationale for the ban. 115 S.Ct. at 1017-1018. Finally, petitioners rely on this Court's citation to Turner Broadcasting System, 512 U.S. 622, 114 S.Ct. 2445, 2470 (1994) to the effect that the government must demonstrate that the recited harms are "real, not merely conjectural." NTEU, 115 S.Ct. at 1017. However, appellants fail to explain how the New Jersey Supreme Court's concern with the appearance of impartiality of the Judiciary is not real. Moreover, petitioners ignore the federal courts' continued obligation to defer to considered "judgments about issues such as appearance of impropriety." NTEU, 115 S.Ct. at 1018.

In Waters v. Churchill, supra, this Court recognized that, in the public employment setting, it must defer to reasonable predictions of government employers.

> We have consistently given greater deference to government predictions of harm used to justify restrictions of employees speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, [although the Court has allowed public employer restrictions on such speech by public employees] see Public Workers v. Mitchell, supra, 330 U.S. at 99; [114 S.Ct. at 1887].

In sum, NTEU is distinguishable from the instant case because it involved 1) a broad-based ban on a wide array of speech by all government employees, 2) a ban on speech with no nexus to public employment, and 3) numerous anomalies which called into question the rationale which supported the governmental interest in the Pickering balancing analysis. While the result in NTEU is distinguishable, it is significant that the case continues to apply the Pickering balancing analysis to governmental policies limiting public employees' speech and confirms the significance of whether such employee activity has a nexus to the public employment.

B.

PANJ'S TWO DUE PROCESS CLAIMS WERE EITHER NOT RAISED BELOW AND/OR CLEARLY LACK MERIT.

Petitioner Probation Association of New Jersey raises two due process claims. First, petitioner argues that the New Jersey state constitutional right of public employees to present grievances "through representatives of their own choosing," N.J. Const. (1947) Art. I, ¶19, and the New Jersey Employer-Employee Relations Act, N.J. Stat. Ann. 34:13A-5.3, created a liberty interest in probation officers' membership in police organizations. While petitioner PANJ did assert, in the district court, state law claims based on the state constitution and the New Jersey Employer-Employee Relations Act, neither its complaint nor its briefs to the district court asserted that these state law rights created a liberty interest triggering due process rights. (P. App. 18a-19a, 35a). For that reason, the issue was not addressed in the district court opinion. It was raised for the first time in the Third Circuit, but that court did not address the issue. Because the issue was not raised in the trial court, it should not be considered on appeal. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

Moreover, it is well established that the rights afforded to public employees under the New Jersey Constitution are more limited in character than those available to employees in the private sector and do not extend to every public employment relationship. Communication Workers of America v. Union Co. Welfare Bd., 315 A.2d 709, 715 (N.J. App. Div. 1977). Petitioners are unable to cite any authority for the position that the relevant state constitutional or statutory provisions create any liberty interests.

PANJ also alleges that the New Jersey Supreme Court's decision effects a taking of property without due process of law. The linchpin of this argument is the assertion that the policy threatens a termination of their jobs. However, the policy merely requires that probation officers resign any affiliations with police organizations. Only if they violate the policy would they be subject to discipline, including loss of employment.

Clearly, the mere establishment of a policy, which if violated could result in discipline or termination, does not constitute the taking of property. Indeed, petitioners did not allege, as they could not, that if any probation officers are terminated for violation of the policy that they would not be given a hearing on that action. As the district court found, it is the termination of employment which must be attended by due process, not the announcement of a policy (P. App. 35a-36a). Petitioner totally fails to address this clearly meritorious determination.

C.

THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PETITIONERS' STATE LAW CLAIMS.

Petitioner PANJ suggests that this matter involves "extraordinary circumstances" justifying the retention of federal jurisdiction over purely state law claims, even if all federal claims are dismissed. Cito v. Bridgewater Tp. Police Dept., 892 F.2d. 23, 26 (3d Cir. 1989). The state law claims involve alleged violations of probation officers' constitutional right to a union representative of their own choosing and a violation of the New Jersey Employer-Employee Relations Act. Before addressing the discretionary authority of federal courts to exercise jurisdiction over state law claims, 28 U.S.C. §1367, it must be recognized that in this case the state law claims have been brought against the Justices of the New Jersey Supreme Court, in their official capacity. Therefore, the Eleventh Amendment of the United States Constitution, which immunizes the states from federal jurisdiction over state law claims, bars federal jurisdiction over the New Jersey law claims in this case. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984).[5]

Moreover, even if the district court had discretion to retain jurisdiction over the supplemental claims here, it clearly did not abuse its discretion in declining to do so. All the federal claims were dismissed before the filing of an answer. No substantial investment of time by the parties or the court had taken place in the issues raised in the state law claims.

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[5] Because the district court saw no reason to exercise its discretion to retain jurisdiction, it did not reach the Eleventh Amendment argument.

Moreover, 28 U.S.C. §1367(c)(1) specifically provides that one reason for declining supplemental jurisdiction is that the claims raise novel or complex issues of state law. The regulatory scheme governing collective negotiating rights of New Jersey public employees, particularly of the State's judiciary, are especially complex.

The New Jersey Supreme Court has squarely held that the provisions of the New Jersey Employer-Employee Relations Act are not legally binding on the judiciary. Passaic County Probation Officer Ass'n v. County of Passaic, supra; I/M/O Judges of Passaic Co., 495 A.2d 848 (N.J. Sup. Ct. 1985). Although, as a matter of comity, the Court has often looked to the Public Employment Relations Commission and its expertise in addressing public employment relations issues as they apply to the judiciary, the New Jersey Supreme Court is free to apply its own judgment to the special needs of the judiciary. In addition, as stated earlier, the rights of public employees in New Jersey are unique and different than those granted to private employees. N.J. Const. (1947), Art. I, ¶19; Passaic Co. Probation Officers Ass'n v. Co. of Passaic, supra.

Citing no authority, petitioners also assert that because the New Jersey Supreme Court is the court of last resort for state law claims in New Jersey, the district court should have exercised supplemental jurisdiction, despite the early dismissal of all federal claims. If accepted, petitioners' argument would turn the federal courts into the tribunals to hear state law claims against the highest court of each state, merely by the use of the device of appending to the claim a meritless federal claim. The New Jersey Supreme Court has in the past reviewed its policies and determined, on constitutional grounds, to modify them or not to apply them to certain circumstances. See In re Gaulkin, 69 N.J. 185 (N.J Sup. Ct. 1976). And the United States Court of Appeals for the Third Circuit has entrusted the New Jersey Supreme Court to do so. See Hughes v. Lipscher, 906 F.2d 964, 967 (3d Cir. 1990).

("The federal courts owe deference to their state counterparts in situations where public perceptions of the integrity of the State judicial system are affected.") Plaintiffs' suggestion that the district court abused its discretion by failing to exercise supplemental jurisdiction over state law claims in this case, and that the Court of Appeals erred in affirming the judgment on that basis, is contrary to established law and principles of comity.

CONCLUSION

For all the reasons stated herein, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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